24662

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 235.

JOHN GLAVEY, APPELLANT,

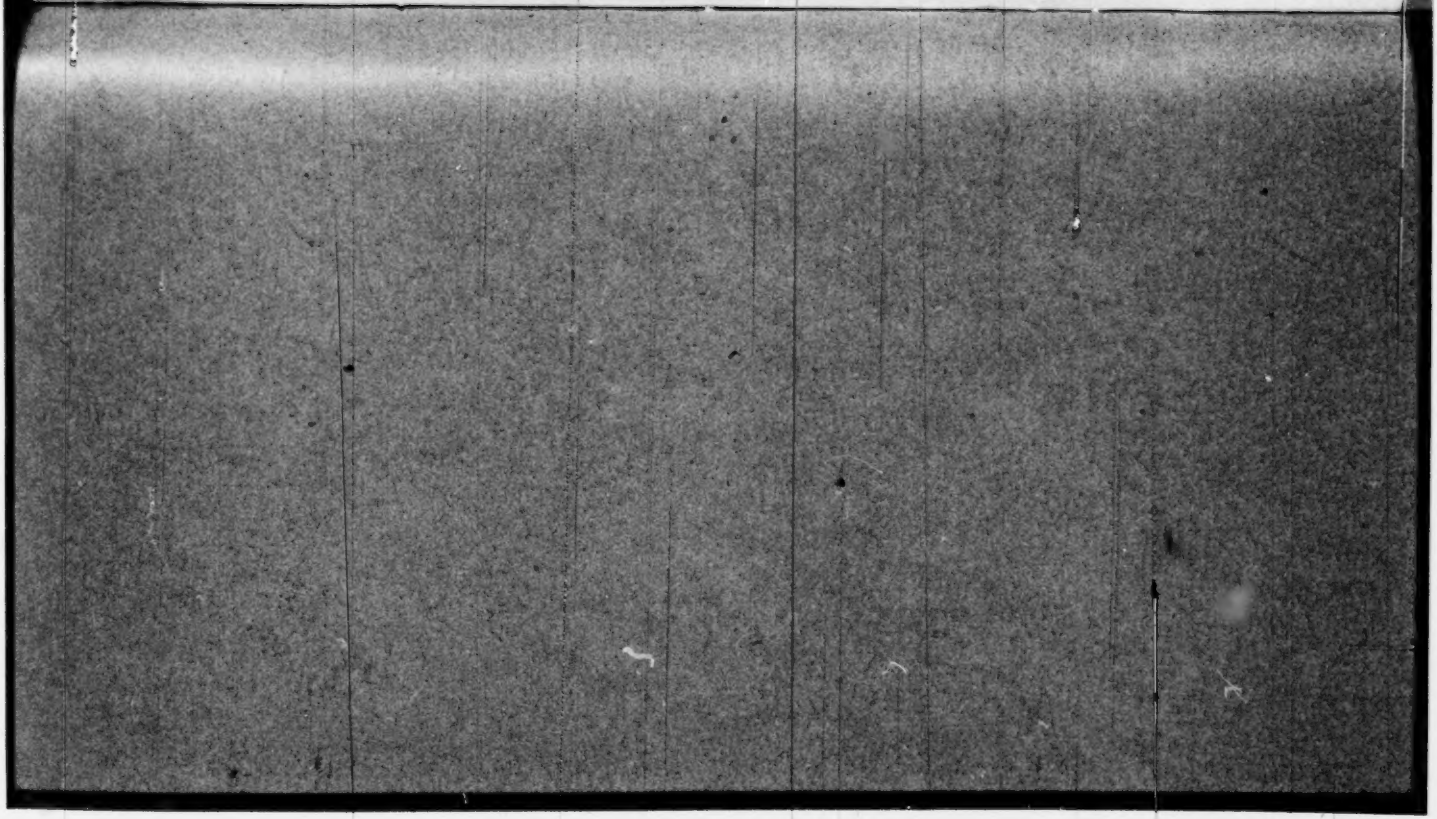
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 29, 1900.

(17,695.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 20, 1900.

1 Court of Claims.

JOHN GLAVEY
vs.
THE UNITED STATES. } No. 20790.

I.—*Petition. Filed May 22, 1897.*

To the honorable justices of the United States Court of Claims:

John Glavey, the plaintiff herein, respectfully represents:

First. That he is a citizen of the United States, of lawful age, and resident at No. 3331 Dauphin street, New Orleans, Louisiana.

Second. That on the seventh (7) day of August, 1882, an act of Congress entitled "An act to amend section 4400, of title fifty-two, of the Revised Statutes of the United States, concerning the regulation of steam vessels," was duly approved and became a law, which act, under section 2, provided that "the Secretary of the Treasury shall appoint officers, to be designated as special inspectors of foreign steam vessels, at a salary of two thousand dollars per annum each, and there shall be appointed of such officers at the port of New York, six; at the port of Boston, two; at the port of Baltimore two; at the port of Philadelphia, two; at the port of New Orleans, two; and at the port of San Francisco, two."

Under sections 3, 4, and 5, the official duties of such inspectors were defined, and section 6 provided "that the salaries of the special inspectors of foreign steam vessels and clerks provided for, together with their travelling and other expenses when on official duty, * * * shall be paid for by the Secretary of the Treasury out of any moneys in the Treasury not otherwise appropriated;" which said act continued in force until it was repealed by act of Congress approved March 1, 1895.

Third. That on the 15th day of May, A. D. 1891, the petitioner was appointed by the Secretary of the Treasury, under the provisions of the statute heretofore cited, approved August 7, 1882, a special inspector of foreign steam vessels for the port of New Orleans, Louisiana, "the appointment to take effect from the date of oath."

Fourth. That the petitioner took the oath of office on or about the 25th day of May, 1891, and entered immediately upon the discharge of the duties of the office of special inspector of foreign steam vessels at the port of New Orleans, and continued in the office and to discharge the duties of said office until the 27th day of May, A. D. 1894.

Fifth. That while the petitioner was duly appointed by the Secretary of the Treasury, under the act heretofore cited, approved August 7th, 1882, and performed the duties of a special inspector of foreign steam vessels from the 25th day of May, 1891, to the 27th day of May, 1894, a period of three years and two (2) days, he did

2 not receive from the Secretary of the Treasury or any other officer or agent of the United States, or from the United States, the salary of two thousand dollars ($2,000) per annum

as provided in the act of Congress approved August 7th, 1882, for special inspector of foreign steam vessels for the said service from the 25th day of May, 1891, to the 27th day of May, 1894, nor for any part of that time, nor any part of the two thousand dollars ($2,000) affixed by act of Congress to the office, and which the act of August 7th, 1882, says "shall be paid for by the Secretary of the Treasury, out of any moneys in the Treasury not otherwise appropriated."

Sixth. That the petitioner has demanded of the Secretary of the Treasury of the United States the sum of six thousand and eleven dollars and ninety-eight cents ($6,011.98), as payment of salary as special inspector of foreign steam vessels, at the rate of two thousand dollars ($2,000) per annum, from May 25th, 1891, to May 27th, 1894, being three years and two days, and was refused.

Wherefore the plaintiff claims from the United States the sum of six thousand and eleven dollars and ninety-eight cents ($6,011.98) and prays:

Prayers.

First. That judgment be entered against the United States for the claimant for the sum of six thousand and eleven dollars and ninety-eight cents ($6,011.98) and the costs of this suit, and that process issue therefor.

Second. For such other and further relief as, the premises considered, may be equitable and just.

JOHN GLAVEY, *Claimant.*

E. S. MUSSEY,
Solicitor for Plaintiff.

STATE OF LOUISIANA,
City of New Orleans, County of New Orleans, } ss:

I do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof; and that the facts therein stated upon personal knowledge are true, and those stated upon information and belief I believe to be true; and that the sum herein claimed is justly due from the defendant, exclusive of all set-offs and just grounds of defence.

JNO. GLAVEY.

Subscribed and sworn to before me this fourth day of May, A. D. 1897.

[SEAL.] J. V. GUILLIOTT, *Not. Pub.*

In the United States Court of Claims.

JOHN GLAVEY
v.
THE UNITED STATES. } No. 20790.

Affidavit of John Glavey.

CITY AND COUNTY OF NEW ORLEANS, LOUISIANA, *ss:*

John Glavey, being duly sworn, deposes and says that he is the claimant in the above-entitled cause, the sole owner of the claim, and the only person interested therein, and has made no assignment or transfer of said claim or any part thereof.

JOHN GLAVEY.

Subscribed and sworn to before me this twenty-eighth day of May, A. D. 1897.

[SEAL.] J. V. GUILLIOTT, *Not. Pub.*

Filed June 3, 1897.

3 II.—*Traverse. Filed June* 12, 1897.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and ha- not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOSHUA E. DODGE,
Assistant Attorney General.

4 III.—*Findings of Fact and Conclusions of Law.*

JOHN GLAVEY
v.
THE UNITED STATES. }

This case having been heard by the Court of Claims, the court, upon the evidence, make the following

Findings of Fact.

I.

The claimant, a citizen of the United States, residing at New Orleans, La., was, on the 17th day of April, 1891, duly appointed, pursuant to Revised Statutes, section 4415, to the office of local inspector

of hulls of steam vessels, for the district of New Orleans, La., and on April 21, 1891, he accepted said appointment and duly qualified by taking the prescribed oath of office and by forwarding the same together with the official bond prescribed by law therefor to the Treasury Department. He then and there entered upon the discharge of his duties and continued to discharge the same until May 27, 1894.

During the claimant's incumbency of said office he claimed each month the salary thereof by rendering his accounts therefor, which were promptly paid by the defendants.

II.

The report of the supervising inspector general for the fiscal year ending June 30, 1889, recommended:

"That sections 2 to 6, inclusive, of the amendment to section 4400, Revised Statutes, which provides a separate set of officers and clerks for the inspection of foreign steam vessels be repealed, the reasons for the creation of such offices having ceased to exist upon the passage of the act approved June 19, 1886, which abolished the fees formerly collected from domestic steam vessels and their licensed officers, which fees were permanently appropriated previously for the support of the domestic inspection service and which could not legally be diverted therefrom for the support of officers and clerks inspecting foreign steam vessels, from whom no fees could legally be collected for such support. The action of Congress in the matter of creating the separate offices was based on the reasons given in the following extract from the special report of the supervising inspector general, dated January 21, 1882:

"'* * * * Authority should be given the Secretary of the Treasury to appoint these special inspectors and to pay their salaries, * * * per annum, and necessary traveling expenses, from funds appropriated from moneys in the Treasury not otherwise appropriated, as it would seem obviously improper that such special officers should be paid from the appropriation for the salaries and expenses of steamboat inspection from funds collected by a tax on American steamboat owners and the licensed officers of such vessels.'

"As the officers and clerks of both services are now paid from funds in the general Treasury, the advantage of uniting the two services must be clearly obvious, both as to public interests and economy in conducting the service.

"In the latter respect a saving can be made of all the salaries now being paid, except at the port of New York, where two of the officers and the clerk might be retained by transfer to the domestic service, dispensing with the services of the other two now employed. The inspectors at San Francisco, Boston, Philadelphia, Baltimore, and New Orleans could be dispensed with altogether, thereby saving to the Government the sum of $14,000 annually, the total of salaries now paid those officers. The additional work that would fall upon the domestic service by such dispensation would be as follows:

	Steamers.		Steamers.
At New York	138	At Buffalo	8
At San Francisco	11	At Oswego	22
At Boston	18	At Burlington, Vt.	3
At Portland, Me.	7	At Detroit	2
At Philadelphia	8	At New Orleans	16
At Baltimore	10		
At Port Huron	3	Total	257
At Marquette	11		

"JAS. A. DUMONT,
"*Supervising Inspector General.*"

III.

By the finance report of the Secretary of the Treasury to the Speaker of the House of Representatives, first session Fifty-first Congress (1889), it was recommended "that all laws be repealed which provide a separate establishment for the inspection of foreign steam vessels, and that the inspectors of domestic steam vessels be authorized and required to perform all necessary services in connection with the inspection of foreign steamships. The offices proposed for abolition are virtually sinecures, and until they are abolished the Executive will remain subjected to importunity to fill them. The services of three of these officers have been dispensed with."

The three officers disposed of were those at San Francisco, Cal.; New Orleans, La., and Philadelphia, Pa.

IV.

While the claimant was holding the office, aforesaid, to wit, May 25, 1891, he received from the Secretary of the Treasury a communication, of which the following is a true copy, viz:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *May* 15, 1891.

"Mr. John Glavey, New Orleans, Louisiana.

"SIR: Under the provisions of an act of Congress, approved August 7th, 1882, entitled 'An act to amend section 4400 of title
6 52 of the Revised Statutes of the United States, concerning the regulation of steam vessels,' you are hereby appointed to serve in connection with your appointment as local inspector of hulls of steam vessels, as a special inspector of foreign steam vessels, without additional compensation, for the port of New Orleans, Louisiana, the appointment to take effect from date of oath.

"Respectfully yours,
(Signed) "CHARLES FOSTER, *Secretary.*"

V.

May 25, 1891, the claimant took the oath therein referred to, which was in the usual form of an oath of office, and transmitted

the same to the Secretary of the Treasury on that date. He was not required to and did not give or offer to give the bond prescribed by statute for the office of special inspector of foreign steam vessels. From the time of taking the oath aforesaid until May 27, 1894, the claimant performed the duties of a special inspector of foreign steam vessels at said port.

VI.

During the time the claimant was performing the duties of special inspector of foreign steam vessels, as aforesaid, he made no request or demand upon the Secretary of the Treasury or any other officer of the defendants, to be paid the salary prescribed by law for the incumbent of the office of special inspector of foreign steam vessels at said port, nor did he when he subscribed the oath as aforesaid; nor did he at any time thereafter while he held said office of local inspector of hulls of steam vessels for which he was paid as aforesaid make to the Secretary of the Treasury or to any other officer of the Government any protest or objection whatever to the performance of the duties of special inspector of foreign steam vessels in connection with his appointment as local inspector of hulls of steam vessels at said port without additional compensation.

VII.

Prior to the time the claimant ceased to perform the services aforesaid, he received from the acting Secretary of the Treasury a communication of which the following is a true copy:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *December* 15, 1893.

"Mr. John Glavey, inspector of hulls of steam vessels, New Orleans, La.

"SIR: Department letter of the 7th instant requesting you to tender your resignation as inspector of hulls of steam vessels for the tenth district is hereby revoked, and you are requested to tender your resignation as inspector of hulls of steam vessels for the district of New Orleans, La., also as special inspector of foreign steam vessels for the port of New Orleans, La., to take effect upon the appointment and qualification of your successor.

"Respectfully yours, W. E. CURTIS,
"*Acting Secretary.*"

7 Thereafter he received from the acting Secretary another communication, of which the following is a copy:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *April* 14, 1894.

"Mr. John Glavey, inspector of hulls of steam vessels, New Orleans, La.

"SIR: Your services as inspector of hulls of steam vessels for the

district of New Orleans, La., are hereby discontinued, to take effect upon the appointment and qualification of your successor."

"Respectfully yours, S. WIKE,
"*Acting Secretary.*"

(Took effect Monday, May 28, 1894.)

And, thereafter, May 28, 1894, the claimant's duly appointed and qualified successor as local inspector of hulls of steam vessels entered upon the discharge of the duties of said office after which the claimant ceased to perform the duties of said office. The claimant performed the duties of said office as special inspector of foreign steam vessels until said May 26, 1894, a period of three years and two days.

Conclusion of Law.

Upon the foregoing findings of fact, the court decide, as a conclusion of law, that the claimant's petition be dismissed.

BY THE COURT.

8 IV.—*Opinion of the Court and Dissenting Opinion.*

HOWRY, J., delivered the opinion of the court:

This is an action to recover salary amounting to $6,010.90, which, under the act of August 7, 1882 (22 Stat. L., 346), was provided for the payment of a special inspector of foreign steam vessels. The time for which salary is claimed covers three years and two days.

While the claimant was holding the office and performing the duties of local inspector of hulls of steam vessels at the port of New Orleans, and receiving the salary thereof, $2,250 per annum, the Secretary of the Treasury sent the claimant a letter, as follows:

"TREASURY DEPARTMENT,
"OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *May* 15, 1891.

"Mr. John Glavey, New Orleans, La.

"SIR: Under the provisions of an act of Congress approved August 7, 1882, entitled 'An act to amend section 4400 of title 52 of the Revised Statutes of the United States, concerning the regulation of steam vessels,' you are hereby appointed to serve in connection with your appointment as local inspector of hulls of steam vessels, as a special inspector of foreign steam vessels, without additional compensation, for the port of New Orleans, La., the appointment to take effect from date of oath.

"Respectfully yours,
CHARLES FOSTER, *Secretary.*"

The claimant took the oath as directed and entered upon the discharge of the duties pertaining to the office. He was not required to nor did he give the official bond provided for by section 4 of the act nor did he offer to give bond. He served as such special in-

spector of foreign steam vessels from May 25, 1891, to May 27, 1894, a period of over three years, during which time he made no demand upon the Secretary of the Treasury or any other officer of the Government for the salary or other compensation for such service; nor did he during that period make any protest or objection to the Secretary of the Treasury or to any other officer of the Government concerning the performance of the service as such special inspector in connection with his appointment as local inspector without additional compensation.

December 15, 1893, the acting Secretary of the Treasury, as set forth in the findings, requested the claimant to tender his resignation as "inspector of hulls of steam vessels for the district of Louisiana, also as special inspector of foreign steam vessels for the port of New Orleans, La., to take effect upon the appointment and qualification of your successor;" and thereafter, May 28, 1894, his duly appointed and qualified successor as local inspector of hulls of steam vessels entered upon the discharge of the duties of said office, after which the claimant also ceased to perform the duties of special inspector of foreign steam vessels.

The claimant proceeds upon the theory that by that act of the Secretary of the Treasury he was duly appointed to the office of special inspector of foreign steam vessels, and that having taken the oath in the usual form and entered upon and discharged the duties pertaining to the office, he is entitled to the salary provided therefor by section 2 of the act, notwithstanding the conditions stated in the letter of the Secretary, and notwithstanding, also, that he was not required to nor did he give the official bond provided for as aforesaid.

Whether the claimant's right to receive the salary sued for be measured by the terms of the letter of the Secretary of the Treasury or by his conduct in assuming to act, in connection with his other duties, as a special inspector of foreign steam vessels without additional compensation, in either event it does not seem proper to hold that this claim has any merit.

The official annual report of the supervising inspector general for the fiscal year ending June 30, 1889, contained a recommendation that sections 2 to 6, inclusive, of the amendment to section 4400, Revised Statutes, which provided a separate set of officers and clerks for the inspection of foreign steam vessels, be repealed, because the reasons for the creation of such offices had ceased to exist after the passage of the act of June 19, 1886, which abolished the fees formerly collected from domestic steam vessels and their licensed officers. These fees were permanently appropriated previous to that time for the support of the domestic inspection service and could not lawfully be diverted therefrom for the support of officers and clerks inspecting foreign steam vessels, from whom no fees could legally be collected for such support.

9 The supervising inspector general is an officer of the Treasury, and his report to the Secretary became a part of the official archives relating to the business of the department. By that report it was further made to appear that a saving could be

made of all salaries paid inspectors of foreign steam vessels (except as to the port of New York) by uniting these with those of local inspectors of hulls of steam vessels. It is true that the recommendation of the Secretary of the Treasury for the repeal of the law suggested by the report of his subordinate was not immediately acted upon by Congress, but the fact remains that at certain ports, including New Orleans, the duty of inspectors of foreign steam vessels had practically ceased. Thus, for the fiscal year ending June 30, 1890, the services of special inspectors of foreign steam vessels at the ports where no necessity existed for regular appointments were discontinued and local inspectors were assigned to inspect the foreign vessels without extra pay. An incumbent at New Orleans by regular appointment under the amendment to section 4400 of the Revised Statutes was removed during that fiscal year because the duties were nominal.

In that part of his finance report to Congress relating to the foreign inspection service, Secretary Windom, in 1889, expressly stated that the offices involved in the inspection of foreign steam vessels were virtually sinecures, and that the services of three of these officers had been dispensed with. (Rep. Sec. Tr., 1st sess. 51st Cong.) One of these officers so discontinued was the incumbent at New Orleans, as above stated. Congress was slow in repealing the law, but sanctioned the steps taken by the Secretary in the interest of public economy as far as silence and acquiescence in his action could go. In this condition of affairs Secretary Foster made the request of the claimant out of which this controversy has arisen.

In the transaction of the business of the Government judicial notice can be taken of the official reports and acts of the executive departments unless for reasons of public interest and policy secrecy is maintained as to them by the heads of departments. With knowledge of the facts which these reports and acts of the Treasury Department afford to us, the question then arises whether in the matter before us the Secretary of the Treasury had the power to devolve the duties of special inspectors of foreign steam vessels without additional compensation upon local inspectors of hulls of steam vessels at the ports of entry where the necessity for regular separate officers no longer existed.

That the Secretary had no power to compel the local inspectors to serve without extra compensation is a matter not necessary to discuss, because no such attempt was made. Compulsory service does not enter into the case at all. And it may even be conceded for the purposes of the argument that the incumbent of any one office cannot be required to perform duties, however slight, belonging to another office without the corresponding right to claim whatever salary there may be attached to the second office. But it is not uncommon in the business of executive administration for the incumbent of an office to be requested to discharge the duties of another office in connection with the duties of his own. Nor is it uncommon for these dual duties to be performed without any thought of claiming or supposed right to claim the salary attached to both. Instances are not wanting—in fact, they are

numerous—where in the exigencies of the public service double duties are assigned to particular officials (above the grade of clerks) without the corresponding right on the part of the official thus assigned to claim compensation for the second office. There is nothing dangerous in this practice, since an official may ordinarily decline to take upon himself the obligations and duties of an office different from his own without some agreement or understanding for additional compensation. This claimant undertook to specially discharge new duties temporarily without any expectation of a new commission. He complied with the Secretary's request, and accepted the special service upon the terms requested. The request was unattended by anything indicating duress, and was merely the equivalent of a detail to service. It was a conditional appointment, and therefore no such appointment as conferred title to the office. Claimant looked upon it in this light by not giving the bond which the statute imposed, or even offering to give it, at any time during the period of his service. The Secretary had no power under the law to dispense with a bond. His failure to prescribe the conditions of a bond establishes the belief that he never intended to make complete claimant's appointment to the office for which salary is now claimed. The oath taken by claimant was merely the incident to the discharge of the duties, and could not in itself make him a *de jure* officer. As an officer *de facto* he can claim nothing for himself. (The People *v.* Weber, 89 Ill., 348.) The decisions are uniform that one claiming a salary must prove his legal title to the office and that an officer *de facto* cannot maintain an action for salary. (Romero *v.* The United States, 24 C. Cls. R., 336; see also Dorsey *v.* Smyth, 28 Cal., 25; Stratton *v.* Oulten, 28 Cal., 51; Morton *v.* Tiernan, 30 Barb., 193; Bennett's case, 19 C. Cls. R., 358.)

It is a matter of no consequence in determining the rights of the claimant what action, if any, the Secretary of the Treasury would have taken for the inspection of steam vessels had claimant not rendered the special service. Whether the Secretary would have omitted to have a few vessels inspected at so high a price by neglecting to fill the offices, or would have hastened the repeal of the law giving such large salaries for services which time had made so insignificant by urging the matter upon the attention of Congress more persistently, we do not certainly know. It is reasonable, however, to suppose that measures in the interest of an economical administration of the affairs of the department would have been taken but for the conduct of the claimant. In any event local inspectors of hulls of steam vessels would probably not have been invited to the feast of a second office having such inconsiderable duties while enjoying the emoluments of those offices which they already held.

If this were a transaction between individuals it could not stand the test which the claimant seeks to have applied in his behalf. His silence operated as a fraud in fact. Had he informed the Secretary that he could not accept the special service indicated upon the terms placed before him by the Secretary's letter, other means,

doubtless, would have been used to obviate the needless expense involved in a regular appointment. But claimant made no protest, gave out no intimation that he expected compensation, led the Secretary to believe that the conditions imposed by the letter assigning him to duty had been accepted, thus misleading his superior officer for a period of several years. The claim, then, is the result of a studied silence apparently, by means of which claimant seems to have thought he might thereafter more successfully claim for a longer period of salary. In this view what else can such a fraud in fact be considered unless it be deemed a fraud in law? If it was an afterthought, there can be no recovery under the well-settled principle of law that if a person renders a service without
11 intent to charge for the same and this is so understood by the other party, no recovery can be had for such services. (Goode *v.* United States, 25 C. Cls. R., 267.) If there was a reserved intention on the part of the claimant to claim the salary, he is upon every principle of law and equity estopped from the assertion of the demand. Acquiescence and waiver are always questions of fact. (Pence *v.* Langdon, 99 U. S. R., 578–581.) The cases where acquiescence and waiver operate in analogy to estoppel are too numerous to cite. Mr. Justice Shiras declares the rule aptly expressed (citing 2 Pom. Eq. Jur., par. 965), as follows:

"When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights and of all the material facts freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. Even where there has been no act nor language properly amounting to an acquiescence, a mere delay, a mere suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands; laches are often a defense wholly independent of the statute of limitations." (Simmons *v.* Burlington, etc., Railway Company, 159 U. S. R., 291.)

That the Government can, in proper cases, invoke the doctrine of acquiescence and waiver is too plain to argue. That it can do so on a claim for salary to an office with insignificant duties undertaken and performed by another officer detailed to their temporary discharge under the facts here is equally clear. Salary is not such a sacred thing that a person should be permitted to impose upon his Government under the circumstances shown here in order to obtain its payment. Estoppel had no application in People *ex rel.* Satterlee *v.* Board of Police (75 N. Y., 38), because in that case there was no question of the full and complete regularity of the appoint-

ment and of the performance of every undiminished duty under it, and the court held that an agreement to take less than the salary fixed by law did not establish a binding contract. Both elements appearing in that case are wanting here—the appointment of the claimant having conditions which rendered it a mere detail to service incident to analogous duties then being performed by him on the ground at the time in another office, and the service under the detail being nominal and perfunctory.

The proposition that under a provision of the act of May 1, 1884 (23 Stat. L., 17), claimant could not accept voluntary service for the Government is not applicable, because that act relates to employees in the Indian Office. Claimant could not render voluntary service and now be heard to say he is entitled to pay for service so rendered in his own violation of the law, even if that act related to other branches of the public service.

The petition is dismissed.

12 *Dissenting Opinion.*

PEELLE, J., dissents:

The claimant in this action seeks to recover the salary of special inspector of foreign steam vessels provided for by the act August 7, 82 (22 Stat. L., 346), under the following appointment:

"TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *May* 15, 1891.

"Mr. John Glavey, New Orleans, Louisiana.

"SIR: Under the provisions of an act of Congress approved August 7th, 1882, entitled 'An act to amend section 4100 of title 52 of the Revised Statutes of the United States, concerning the regulation of steam vessels,' you are hereby appointed to serve in connection with your appointment as local inspector of hulls of steam vessels, as a special inspector of foreign steam vessels, without additional compensation, for the port of New Orleans, Louisiana, the appointment to take effect from date of oath.

"Respectfully yours,

"CHARLES FOSTER, *Secretary.*"

On the part of the defendants it is contended (1) that the claimant was not appointed to the office; (2) that if appointed, he never qualified by giving bond, and was not, therefore, an officer *de jure*, and (3) that if appointed he is estopped from receiving the salary by reason of his silent acquiescence in the action of the Secretary, and by making no demand therefor during his period of service.

It is manifest from the language of the letter that what the Secretary intended was, that inasmuch as the claimant was then holding the office of local inspector of hulls of steam vessels, for which he was being paid the salary of $2,250 per annum, he could, in connection with the duties of that office, also perform, without additional compensation, the duties of special inspector of foreign steam vessels.

The language in the letter of the Secretary, "the appointment to take effect from date of oath," may fairly be considered as a direction to the claimant to take the oath prescribed by law before entering upon the discharge of the duties of the office to which he had been appointed; though if he had omitted that language, such oath, under Revised Statutes, section 1756, would have been an essential prerequisite to his performance of the duties of the office.

The Secretary of the Treasury had no authority to require of the claimant the performance of the duties pertaining to the office of inspector of foreign steam vessels, except pursuant to the statute requiring the same, section 2 of which reads:

"That for the purpose of carrying into effect the provisions of this act the Secretary of the Treasury shall appoint officers to be designated as special inspectors of foreign steam vessels, at a salary of two thousand dollars per annum each, and there shall be appointed of such officers, at the port of New York, six; at the port of Boston, two; at the port of Baltimore, two; at the port of Philadelphia, two; at the port of New Orleans, two; and at the port of San Francisco, two."

13 It will thus be seen "that for the purpose of carrying into effect the provisions of the act, the Secretary of the Treasury shall appoint officers to be designated as special inspectors of foreign steam vessels" * * * "at a salary of $2,000 per annum," two of which were to be appointed at the port of New Orleans. They were not to be appointed at the discretion of the Secretary, nor was he to be the judge even as to the number to be appointed. The services were to be performed as provided in section 3, "under such regulations as shall be prescribed by the Secretary of the Treasury," but manifestly that did not clothe him with authority to annul the statute, or to provide that the services therein provided for might be performed by some one by assignment or designation, or by some qualified appointment without compensation.

And although the Supervising Inspector General, in his report to the Secretary of the Treasury, recommended the repeal of the law as set forth in finding 2, and the Secretary so recommended to the Congress, still the law was not repealed until March 1, 1895 (28 Stat. L., 699).

The Secretary of the Treasury had but two alternatives—either to appoint to office, upon the terms of the statute, if there were duties to be performed, or to leave the office vacant if there were none.

By the urgent deficiency appropriation act of May 1, 1895 (23 Stat. L., 15, 17), under the head of "Indian Office," it is provided: * * * "and hereafter no department or officer of the United States shall accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property."

That language, though seemingly applicable only to the Indian service, is quite broad enough to apply to the heads of the several executive departments; but whether so or not, the law but

emphasizes the principle that where the law provides for the doing of certain things by means of officers to be appointed, and the compensation is fixed therefor, that becomes the rule by which the appointing power and the officer appointed is to be guided.

The salary attached to a public office belongs to the incumbent, not by force of any contract, but because the law attaches it to the office (Fitzsimmons *v.* Brooklyn, 102 N. Y., 536).

Even assuming that the Secretary might have refrained, in the interest of public economy, from exercising his authority of appointment under the act, notwithstanding the seeming mandatory provision of the statute, still he did not do that; and it is clear from his letter that he intended to clothe the claimant with authority to perform the duties of the office. The only way he could do that was in the manner set forth in the statute, and in his letter he cites the act—authority—under which he appointed the claimant and advised him that the appointment would take effect from the date of oath.

The claimant would not have been permitted, after assuming the duties of the office, to have disputed the validity of his appointment as a justification or defense in a criminal prosecution.

It is plain, therefore, that the Secretary intended to and did appoint the claimant as special inspector of foreign steam vessels, which appointment took effect from the date of subscribing the oath.

The defendants contend, however, that because the claimant did not give the bond provided for in section 4 of the act under
14 which he was appointed that therefore his tenure was that of a *de facto* and not a *de jure* officer, and for that reason he had no legal title to the salary of the office. Some authorities are cited in support of the contention stated, among which are the cases of Williams (23 C. Cls. R., pp. 46, 53). Converse, of United States (21 How., 463); Hall *v.* Wisconsin (103 U. S., 5).

In the Williams case the claimant was appointed minister resident and consul general of the United States to Hayti, and his commission therefor was signed and was in the hands of the State Department, where the claimant had taken the oath of office, but by the provision of the Revised Statutes, section 1697, he was inhibited from receiving his commission or entering upon the discharge of the duties of his office until he had given a bond, and hence by his failure to give such bond he was not entitled to his commission, and the court held that he was not therefore entitled to the emoluments of the office.

The defendants also cite the case of The United States *v.* Delaney (164 U. S. R., 282), affirming the decision of this court (31 C. Cls. R., 44). But the only question in that case was as to whether the register and receiver of a newly created land office was entitled to compensation from the time he was engaged, under the verbal direction of the Commissioner of the General Land Office, in the necessary preliminary preparation for opening the office for public business, or from the date of such opening only; and the court held that

having previously qualified by taking the oath of office and giving bond, he was entitled to be paid during the period of such preliminary preparations.

In the case of The United States *v.* Eaton (169 U. S. R., 331), affirming the decision of this court (31 C. Cls. R., 158), it was ruled, among other things, that the claimant, who had been appointed vice consul general by the minister resident and consul general at Siam, to perform the duties of the latter during his absence, was entitled to compensation during the time he performed such duties though no bond was given and approved until thereafter.

In that same case the court, at page 346, in speaking of the contention of the Government that under Revised Statutes, section 1698, it was error to allow the claimant compensation before his bond was approved, the court said:

"It is settled that statutory provisions of the character of those referred to are directory and not mandatory."

In the case of United States *v.* Bradley (10 Pet., 343, 365), which was a suit on the bond of a paymaster wherein it was contended that the giving of a bond before entering upon the discharge of his duties was a prerequisite, and not having done so he was not accountable for the moneys that came into his hands, the court, speaking by Mr. Justice Story, said: "The giving of the bond was a mere ministerial act for the security of the Government, and not a condition precedent to his authority to act as paymaster. Having received the public moneys as paymaster he must account for them as paymaster."

And so in the case of United States *v.* Linn (15 Pet., 290, 313), wherein the statute required the claimant, as receiver of public moneys, to execute a bond before entering upon the duties of the office, the court held that "these emoluments were the consideration allowed him for the execution of the duties of the office, and
15 his appointment and commission entitled him to receive this compensation whether he gave any security or not;" and furthermore, in referring to the case of United States *v.* Bradley (*supra*), the court said: "According to this doctrine, which is undoubtedly sound, Linn was a receiver *de jure* as well as *de facto* when the instrument in question was made."

In the case of The United States *v.* Flanders (112 U. S. R., 88) a collector of internal revenue was required, before entering upon the duties of his office, to give bond, and before being entitled to the salary was also required to take the oath of office, both of which he failed to do for two months, but in the meantime performed the duties of the office. The court in relation thereto held in substance that while his title to receive the compensation did not arise until he had taken the oath, still when he did so he was entitled thereto from the date he commenced to perform the duties of the office.

In the present case section 4 of the act under which the claimant was appointed provides:

"That each special inspector of foreign steam vessels shall execute a proper bond, to be approved by the Secretary of the Treasury, in

such form and upon such conditions as the Secretary may prescribe, for the faithful performance of the duties of his office."

It will be observed by that section that the bond was not only to be approved by the Secretary, but that its form and conditions were also to be prescribed by him, so that if none were prescribed by the Secretary the claimant was not in fault in not giving. At all events, his failure to give such bond did not deprive him of any right he might otherwise have had to the compensation of the office.

Therefore when the Secretary in pursuance of the act referred to in his letter said "you are hereby appointed to serve in connection with your appointment as local inspector of hulls of steam vessels as a special inspector of foreign steam vessels, without additional compensation, for the port of New Orleans, La., the appointment to take effect from date of oath," he thereby appointed the claimant to the office, and upon taking the oath prescribed by law, as he did, he became fully invested therewith as an officer *de jure*, though no bond was required or given, and consequently he was entitled to the emoluments thereof unless his acceptance of the appointment without protest and without making any demand for such compensation during his continuance in office operates as a waiver or an estoppel.

It is undoubtedly settled law that where an office is created and the salary fixed by law that "the appointing power has no control beyond the limits of the statutes over the compensation, either to increase or diminish it." Adams' case (20 C. Cls. R., 115, 117), and many other cases there cited to the same effect.

The vital question is, Does the doctrine of waiver or estoppel apply in cases of this kind?

The claimant by accepting the office and performing the duties thereof without protest and without making any demand for compensation during his continuance in office may in fact have led the Secretary to believe that the conditions he sought to impose in his letter of appointment had been accepted by him.

16 But manifestly the Secretary of the Treasury had no right to impose such conditions, and in doing so he exceeded his authority, even though he acted from motives of public economy. Hence the claimant's silence must be considered only in reference to the conditions sought to be imposed by the Secretary, for manifestly had no such conditions been incorporated in the letter of appointment his failure to demand the salary of the office during his term of service could not be urged as a waiver or as an estoppel.

When the Congress have enacted a law providing for the doing of certain things by means of officers to be appointed therefor at fixed salaries, that becomes the only rule by which such services are to be performed. The question of public economy in respect thereof has been settled by the law, and by that the officer who performs such service is entitled to have his rights measured.

The statute under which the claimant was appointed fixed the salary of his office at $2,000 per annum, and that he was entitled to, notwithstanding the salary he received as local inspector, as the two offices were not incompatible and they were distinct, each having its own duties and compensation defined by statute. (United States *v.*

Saunders, 120 U. S. R., 126, 129.) Hence the defendants could not have been misled to their injury by the claimant's silence in respect of the compensation to which he was entitled by law, and over which the appointing power had no control. (United States *v.* McLean, 95 U. S. R., 750.)

In the interest of the public service the weight of authority undoubtedly is against the validity of waiving and, perhaps, of pledging official compensation to accrue for services to be rendered, or to satisfy the same by a less amount even though a receipt be given therefor in full. (Fisher's case, 15 C. Cls. R., 323.)

If that be true, can it be held that the claimant by his silence waived his right to that which was due him by law, and about which no one had any authority to deprive him of even by contract? He accepted the office and qualified by taking the oath. He performed the service and the defendants received the benefits thereof.

In the case of Railroad Company *v.* Dubois (12 Wall., 47, 64), it was said "No principle is better settled than that a party is not estopped by his silence unless it has misled another to his hurt."

In the Alvord case (8 C. Cls. R., 364, 369) the authorities on the question of estoppel by the silence of a party are set out quite fully, the substance of which is that no one is permitted to keep silent when in conscience he ought to speak, and if he does so to the hurt of another, he shall be debarred from speaking in defense when conscience requires him to keep silent.

The defendants cannot be said to have been misled to their injury by reason of the failure of the claimant to say that he would not accept the office and perform the duties thereof without additional compensation, for the law under which he was appointed, and under which the Secretary acted, also fixed the compensation, and that the claimant was bound to know could not be increased or diminished by the appointing power.

The Secretary having no authority to increase or diminish the salary, he of course had none to take it away altogether, and therefore when he appointed the claimant as special inspector to serve without compensation he exceeded his authority, and the claimant was not bound to speak, especially when by declining to serve without compensation his resignation of the office of local inspector might have been called for and the compensation of that office lost to him. In this respect the Secretary and the claimant were not on equal terms. (Swift Company *v.* United States, 111 U. S. R., 22, 28; Robertson *v.* Frank Bros. Co., 132 U. S., 17, 23.)

The Secretary's letter of appointment should not be construed as an order assigning to duty a man who was not an inspector in law or in fact to examine the vessels of private owners and subject them to the "visitation" and penalties prescribed by the Revised Statutes, sections 4407, 4418, 4421, 4423, and 4424.

The claimant grounds his right to recover on the statute, a law of the Congress, and our duty is simply to give effect to that statute by

the application of the facts, and this we have endeavored to do, and in our view of the case the claimant should recover.

Nott, Ch. J., concurred in the opinion of Peelle, J.

17 V.—*Judgment of the Court.*

JOHN GLAVEY
vs.
UNITED STATES. } No. 20790.

At a Court of Claims held in the city of Washington on the 12th day of March, A. D. 1900, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants, and do order, adjudge, and decree that the petition of the claimant, John Glavey, be dismissed.

BY THE COURT.

18 VI.—*Application for and Allowance of Appeal.*

JOHN GLAVEY
vs.
UNITED STATES. } No. 20790.

To the honorable justices of the Court of Claims:

Now comes the petitioner herein, by his attorney, Mrs. Ellen S. Mussey, and moves the court for leave to appeal to the Supreme Court of the United States from the decision of your court dismissing the petition herein.

E. S. MUSSEY,
Attorney for Petitioner.

Filed March 22, 1900.

MARCH 22, 1900.

The foregoing application for appeal having been presented by the attorney for the claimant in open court, it was ordered that the same be allowed as prayed for.

BY THE COURT.

19 Court of Claims.

JOHN GLAVEY
vs.
UNITED STATES. } No. 20790.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusions of law filed by the court, of the opinion of the court and the dissenting opinion, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 29 day of March, A. D. 1900.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No., 17,695. Court of Claims. Term No., 235. John Glavey, appellant, *vs.* The United States. Filed March 29th, 1900.

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No. 235.

UNITED STATES SUPREME COURT

Brf. of Benedict & Mussey for

Filed Mar. 14, 1901.

JOHN GLAVEY
Appellant
vs.
THE UNITED STATES
Respondent
} No. 235

POINTS FOR APPELLANT

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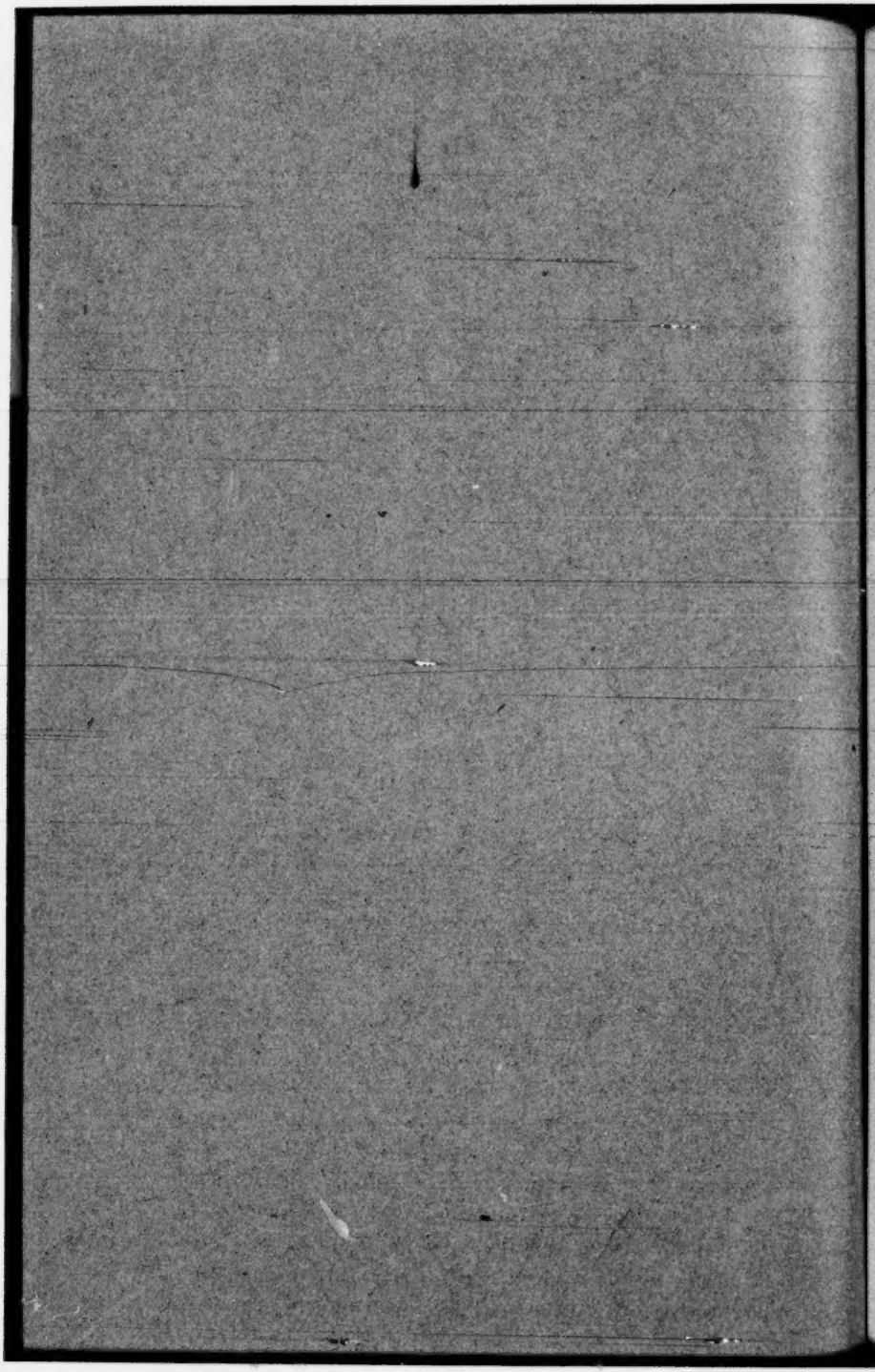

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IN THE

UNITED STATES SUPREME COURT.

JOHN GLAVEY,
Appellant,

vs. No. 235.

THE UNITED STATES.

POINTS FOR APPELLANT.

This is an appeal by the Petitioner from a judgment of the Court of Claims dismissing the petition.

The action is brought to recover salary due from the United States to the petitioner as Special Inspector of Foreign Steam Vessels.

The Act of Congress of August 7th, 1882 (22 U. S. Stat. at Large, p. 346), by its first section provided that "foreign steam vessels carrying passengers from any port in the United States to any other place or country," should be subject to the provisions of certain sections of the Revised Statutes of the United States, which it proceeded to specify. By its second section it provided that for

the purpose of carrying this Act into effect, the Secretary of the Treasury "shall appoint sixteen officers to be designated as Special Inspectors of Foreign Steam Vessels, *at a salary of two thousand dollars per annum each.*"

On the 15th day of May, 1891, the petitioner was appointed by the Secretary of the Treasury a Special Inspector of Foreign Steam Vessels for the port of New Orleans, La., "the appointment to take effect from the date of oath."

On the 25th of May, 1891, the petitioner took the oath of office and entered on the discharge of his duties, and continued in the office till the 27th day of May, 1894, and he brought this suit to recover against the United States the salary attached, by the second section of the Act of 1882, to the office of Special Inspector of Foreign Steam Vessels, at the rate of $2,000 per annum, for the period during which he held that office.

The Court of Claims by a divided Court (three Judges against two) decided against the petitioner, who brings this appeal.

Since that decision the case of Miller v. The United States involving the same question has been decided in the U. S. Circuit Court in accordance with the views of the minority (103 Fed. Rep. p. 415) and will be referred to hereafter.

First Point.

On the Findings made the Petitioner was entitled to a decree.

The findings of fact made by the Court of Claims set forth the appointment of the petitioner in full

(fols. 5 and 6), also that the Petitioner took the oath of office (fol. 6), from which date (May 25th, 1891) the appointment was to take effect, and that from that time until May 27th, 1894, he "performed the duties of said office as Special Inspector of Foreign Steam Vessels, a period of three years and two days" (fol. 7).

On these findings it would seem that there was no question but that the Petitioner was entitled to the salary affixed by law to that office and that the decision against him was erroneous, and should be reversed.

Second Point.

The First, Second, Third and part of the Seventh Findings are immaterial.

The Court also made some other findings of fact, but they are utterly immaterial to the questions in the case.

(1). The first finding was that on April 17th, 1891, a month before the appointment in question, the petitioner was appointed Local Inspector of Hulls and performed the duties of that office till May 27th, 1894.

If the salary of an Inspector of Hulls had been $2,500 this would have been pertinent, and would have brought the Petitioner within the provisions of Section 1763 of the Revised Statutes. But as the salary of such Local Inspectors of Hulls was only $2,250 per annum, (Revised Stat. Sec. 4413)

that section of the Revised Statutes has no application.

And the case of the U. S. v. Saunders (120 U. S., p. 126) is a decision of this Court that "that legislation has no application to the case of two distinct offices each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case he is in the eye of the law two officers or holds two places or appointments the functions of which are separate and distinct. *And according to all the decisions he is in such case entitled to recover the two compensations.*"

That finding of the Court below is therefore immaterial.

(2). The second finding of the Court below is also immaterial. How a report of the Supervising Inspector General made nearly two years before the Petitioner's appointment can have any bearing upon the rights of the Petitioner under his appointment is not to be seen under any known law or practice.

(3). Equally immaterial is the extract from the Report of the Secretary of the Treasury quoted in the third Finding of the Court.

The law in question was not repealed until March 1st, 1895. And it has never yet been heard that a recommendation by the Secretary of the Treasury that a law be repealed was equivalent to its repeal.

The third Finding states that the services of a Special Inspector of Foreign Steam Vessels at New Orleans had been "dispensed with." It should be noted that the Statute provided for two such Inspectors at New Orleans. And the fact that the

services of one of them had been dispensed with in 1889, has no bearing on the appointment of the Petitioner in 1891.

(4). The correspondence between the Secretary of the Treasury and the Petitioner *as Inspector of Hulls*, set forth in the Seventh Finding has nothing to do with his rights as Special Inspector of Foreign Steam Vessels.

This finding is therefore also immaterial.

Third Point.

It would seem that, as the Statute in question directs that these officers "shall be appointed by the Secretary of the Treasury" with a salary of $2,000 per annum and as the Court has found that the Petitioner on May 15th, 1891, received from the Secretary of the Treasury a letter saying "you are hereby appointed" "the appointment to take effect from date of oath," and has also found that the petitioner took the oath of office (which by Sec. 1756 of the Revised Statutes every person "appointed to any office" is required to take "before entering upon the duties of such office") and has found that the Petitioner "performed the duties of said office as Special Inspector of Foreign Steam Vessels for a period of three years and two days," the Petitioner was entitled to judgment that he recover the Salary which the Statute affixed to the office, without further discussion.

But as the Court of Claims in its opinion discussed various other questions we suppose we must also discuss and reply to them.

Fourth Point.

The language of the appointment of the Petitioner in the two clauses (1st) "to serve in connection with your appointment as Local Inspector of Hulls," and (2d) "without additional compensation," had no effect to change the appointment.

(1). "The duties of Special Inspectors of Foreign Steam Vessels" were fixed and governed by the Statute. And so were their rights.

They were exactly the same, whether the appointee was "to serve in connection with" anything else or not. Those words made not a particle of difference as to the duties which the Petitioner was to perform.

(2). Under the words of the Statute of 1882, the Secretary of the Treasury had no power except to appoint the officer; and when the officer was appointed, the Statute gave him a right to the salary of two thousand dollars per annum, which the Secretary of the Treasury had no power to take away.

It would be most extraordinary, if, when Congress had seen fit to attach a salary to an office, the incumbent of any Department of the Government, whom Congress had clothed with the power *to appoint to the office* (even were it the Chief Executive of the Government), could repeal that Act of Congress, or that part of the Act by which the salary was attached to the office. Yet that is what the Secretary of the Treasury attempted to do. Congress said that the Secretary of the Treasury should appoint these officers "at a salary of

Two Thousand Dollars per annum each." The Secretary assumed to say, "I will appoint; but I will override the will of Congress which attached the salary to the office. I will repeal that clause of the Act." Such an action of the appointing power is a most dangerous interference by the Executive power with the Legislative power.

The attempted exercise of such a power by the appointing power has come before the Courts. And in every case the Courts have sustained the view which we maintain.

Thus in Adams' Case (20 Court of Claims Rep. p. 117), the Court said, "Where the law creates the office and fixes the compensation, the appointing power has no control beyond the limits of the Statute, over the compensation, either to increase or diminish it."

To the same effect is Garlingers' Case (30 Id. p. 217); Goldsborough v. the United States, Taney's Dec. p. 88; King v. the State of N. Y., 93 N. Y., 294. And see Upton's Case (19 Court of Claims Rep. 49).

In Goldsborough v. The United States, Judge Taney says: "Where an Act of Congress declares that an officer of the Government or Public Agent shall receive a certain compensation for his services, which is specified in the law, undoubtedly *that compensation can neither be enlarged or diminished by any regulation or order of the President, or of a Department*, unless the power to do so is given by Act of Congress."

The above cases were cases of attempted diminution of a salary fixed by Statute. But it would seem that, if the Secretary of the Treasury has no power to diminish a salary fixed by Statute, *a fortiori* is he without power to take it away en-

tirely. It might as well be claimed that the Executive had power to *attach* a salary to an office which Congress had enacted should be without salary, or to *double* the salary which Congress had attached to an office, as that it had power to take it away. It might as well be claimed that the Secretary of the Treasury had power to appoint the Petitioner to this office "at a salary of *Four* thousand dollars a year" as to say that he had power to appoint him "at a salary of *nothing* a year."

It was beyond the power of the Secretary of the Treasury to do either.

Congress gave the Secretary the power to appoint, and that alone. It had itself exercised its own function of fixing the salary. And when the Secretary had exercised the power of appointment, his power was at an end. He had no more power to say, "without compensation" or "without additional compensation," than he had to say, "on condition that you divide the salary with me."

The Court of Claims in Upton's Case (19 Ct. of Claims 49) said, "A Statute, which establishes a salary or prescribes the rate of remuneration, expresses the intent of both parties, as a written agreement does in the case of private employers and employees, and *assures to a Government official a fixed and certain compensation for his services.*"

So this Act of 1882 which created this office assured to the person appointed to be such Government official a fixed and certain compensation for his services, viz., the salary of $2,000 per annum fixed by the Act, and the words of the Secretary "without additional compensation" have no force.

A somewhat similar question, as to the power of

the Secretary of the Navy, came before this Court in the case of the U. S. v. Symonds, 120 U. S., p. 46. In that case Section 1556 of the Revised Statutes had provided that a lieutenant in the Navy was entitled to receive annual pay after five years designation, at the rate of $2,600, "when at sea." Symonds who was such a lieutenant, was appointed to command the United States Training Ship "New Hampshire," at Norfolk, Va. Afterwards, the Secretary of the Navy issued an order that after such a date certain vessels, among which was the New Hampshire, "would not be considered as being in commission for sea service." And after that date Symonds was only allowed compensation at the rate for shore duty, instead of the rate when at sea. He brought suit to recover the difference. The Court held that the New Hampshire was "at sea," within the meaning of the law; and it decided that Symonds was entitled to be paid at the rate provided for such an officer "at sea," using this language: "Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation as established by law, by declaring that to be shore service which was in fact sea service, or to increase his compensation by declaring that to be sea service which was in fact shore service. The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition necessarily implied, that they must be consistent with the Statutes which have been enacted by Congress in reference to the Navy. He may with the approval of the President, establish regulations in execution of or supplemental to, but not in conflict with, the Statutes defining his powers, or conferring rights upon others. The

contrary has never been held by this Court. What we now say is entirely consistent with Gratiot v. The U. S., 4 How. 80, and *Ex parte* Reed, 100 U. S. 13, upon which the Government relies. Referring in the first case to certain Army Regulations, and in the other to certain Navy regulations, which had been approved by Congress, the Court observed that they had the force of law. See also Smith v. Whitney, 116 U. S., 181. In neither case however, was it held that such regulations, when in conflict with the Acts of Congress, could be upheld. If the services of Symonds were in the meaning of the Statute performed "at sea," his right to the compensation established by law for sea service, is as absolute as the right of any other officer to his salary as established by law."

This case is referred to and followed in the case of the U. S. v. Barnette, 165 U. S., p. 179.

It must follow, *a fortiori*, that if the Secretary of a Department has no authority to diminish an officer's compensation, as fixed by law, by any general regulation, he has no power to diminish it or take it away by any words inserted in the appointment of the officer. The language in the Symonds case, that the Secretary "may establish regulations in execution of, or supplemental to, but *not in conflict with the Statutes defining his powers, or conferring rights upon others*," is expressly applicable. The Statute in question defined the power of the Secretary to be the power of appointment of the officer only. The Statute had itself conferred upon such officer, when appointed, the right to the salary established by law, which right this Court spoke of as "absolute." Hence it must follow that the Secretary of the Treasury had no right either to make a regulation or a condition to his appointment which should be in conflict with the Statute, which defined his

powers and which conferred upon his appointee the right to the salary established by law.

Fifth Point.

The appointment of the Petitioner was neither more nor less than an appointment to the office.

The majority opinion of the Court of Claims uses different language in different places as describing the letter of appointment.

It is spoken of as "the Secretary's request" and as "the equivalent of a detail to service" and also as "a conditional appointment." (fol. 10).

(1). But to describe the words of the Secretary "you are hereby appointed" as a *request* is "an abuse of the dictionary," and an extraordinary charge of ignorance of the meaning of words against Secretary Foster.

(2). To speak of it as a "detail to service" is also entirely unjustifiable.

It was an "*appointment*" to this office "*the appointment* to take effect from date of oath."

(3). Conditional appointments are not known to the law. The Secretary had no power to make a *conditional* appointment. The Statute directed the Secretary *to appoint* and that was all.

The further language of the Court that the appointment had "conditions which rendered it a mere detail to service" is an erroneous statement. The duties of the two offices were entirely distinct. The Secretary had no power to attach any condition to it. And it was no more a "detail to service" than any other appointment. And the un-

authorized attempt of the Secretary to repeal the compensation could not legally have any effect on the appointment.

It surely could never be allowed that the appointing power by adding to its words of appointment the words "without compensation" could change an appointment, which the Statute commanded him to make, into a mere "detail of service." Nor could it be allowed that the appointing officer can at his arbitrary will detail one officer to do the work of another, when the Statute required the Secretary "to appoint." That would be to disregard the express commands of the law.

(4). The Majority Opinion also says (fol. 9) that "the question arises whether the Secretary of the Treasury had power to *devolve the duties* of Special Inspectors of Foreign Steam Vessels without additional compensation upon local inspectors of hulls."

The opinion then says that "the incumbent of any one office cannot be required to perform duties, however slight, belonging to another office without the corresponding right to claim whatever salary there may be attached to the second office."

It is extraordinary that the Court did not see that this language called for a decision in favor of the Petitioner.

If the letter of the Secretary of the Treasury did "*devolve* the duties of Special Inspector of Steam Vessels" upon the Petitioner as Inspector of Hulls he was thereby "*required* to perform" those duties, however slight; and therefore he had the "corresponding right to the Salary" attached by Statute. And if the letter of the Secretary was

an appointment to the office, of course he became entitled to the salary. In either case therefore the Petitioner became entitled to the Salary which he claims.

Sixth Point.

The fact that no bond was required or given is immaterial. The Petitioner was an officer not only de facto but also de jure.

Furthermore the majority opinion seems to hold that the fact that the Petitioner did not give a bond prevented him from being an officer *de jure*, but left him only an officer *de facto*, and therefore not entitled to the salary of the office.

Noting the admission in this holding that the appointment of the Petitioner was not merely a "detail to service" but made him an "*officer* de facto," we proceed to show that he was not only that, but also an officer "de jure," and is therefore entitled to the salary.

(*a*). The language of the 4th Section of the Act under which the claimant was appointed is as follows:

"§4. Each Special Inspector of Foreign Steam Vessels shall execute a proper bond, to be approved by the Secretary of the Treasury in such form and upon such conditions as the Secretary may prescribe, for the faithful performance of the duties of his office."

No such form and conditions were ever prescribed.

This Statute is not like some other Statutes of the United States, which provide that an official

must give a bond *before entering upon* the duties of his office. *No such requirement is made in this Statute.* The decision of the Court below is that an officer duly appointed and duly commissioned, who is not required to give a bond before entering on the duties of the office, but who enters upon a performance of the duties of the office, is not an officer *de jure* until he gives a bond.

It seems to us that a more dangerous proposition for the United States could hardly be presented. We are sure that this Court will refuse, as it has always done, to lend countenance to any such defense for defaulting officers of the United States.

The contrary has been held even where the Statute required a bond to be given *before entering on* the duties of the office.

(*b.*) The case of the United States v. Bradley, 10 Peters, 343, was an action on an official bond. Hall had been appointed paymaster on the 26th of May, 1818. A year after, on the 26th of May, 1819, he gave the bond in question. The Statute under which he was appointed provided that officers should give bonds *previous to entering on the duties* of their respective offices. The point was taken, in a defense of the suit brought on the bond, that Hall was not paymaster until he had given that bond. But the Supreme Court said (p. 364): "We are of a different opinion. Hall's appointment as paymaster was complete when his appointment was duly made by the President and confirmed by the Senate. The giving of the bond was a mere ministerial act for the security of the Government, and *not a condition precedent to his authority to act as Paymaster.*" That language is

exactly applicable to the present case. The appointment of the claimant here was complete when his appointment was duly made by the Secretary of the Treasury. And the giving of any bond would have been merely a "ministerial act for the security of the Government." It was not even required to be given by the claimant in this case previous to his entering on the duties of his office. This case is, therefore, *a point-blank* decision of this Court in our favor.

The United States v. Linn, 15 Peters, 290, was also a suit on an official bond. This Court in that case said (p. 313): "The emoluments were the consideration allowed Linn for the execution of the duties of his office, *and his appointment and commission entitled him to receive this compensation, whether he gave the security or not.*" The Court then referred to the above case of The U. S. v. Bradley and said "according to this doctrine, which is undoubtedly sound, *Linn was a receiver de jure as well as de facto when the instrument in question was given.*"

Another case is U. S. v. LeBaron, 19 How., 73. In this case this Court used the following language: "When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President and the seal of the United States affixed thereto, his appointment to that office is complete. Congress *may provide* that certain acts shall be done by the appointee before he shall enter on the duties of the office under his appointment. Those acts *then* become conditions precedent to the complete investiture of the office."

But in the present case, Congress *has not provided* that the bond should be given by the ap-

pointee before he should enter on the duties of his office. In that case this Court held that the appointee was duly commissioned and possessed the office *before* he gave the bond. That case, also, therefore, is a direct authority to hold that the claimant in this case was possessed of the office when he received the appointment and took the oath of office.

The case of the United States v. Eaton (169 U. S., 33), is to the same effect. In that case the law required that Eaton should give a bond before he entered on the execution of his trust. The accounting officer had refused to allow him compensation for the period before he gave the bond. But the Supreme Court referring to the previous cases of the United States v. Bradley and the United States v. Linn, and the United States v. LeBaron, and the United States v. Flanders, held that Eaton was entitled to his compensation for the period *before he gave the bond.*

All the above decisions hold that when one has been appointed to an office, has received his commission, and has taken the oath, (which by Section 1756 of the Revised Statutes he is required to take as a condition precedent to entering on the duties of the office), and then enters upon the duties of the office, he then has become invested with the office. Therefore the claimant in this case became invested with the office on the 25th of May, 1891, when he took the oath of office and entered on his duties. And that being so, the *Statute of the United States* entitled him to the compensation which Congress had affixed to the office.

The majority opinion has cited several cases to support the doctrine that the Petitioner *must be* an

officer *de jure* in order to recover, which never was denied. It has disregarded the cases, though they were discussed in the minority opinion, which decided that he *was* an officer *de jure*.

(*c*). To the above considerations should be added that as the form and conditions of the bond were to be prescribed by the Secretary and the bond approved by him, and as no form or conditions were ever prescribed by the Secretary, the Petitioner could not give a bond by reason of the default of the Secretary. And such failure could not deprive him of his rights to compensation. (Minority Opinion fol. 15).

(*d*). And when the appointment stated "appointment to take effect *from the date of oath*," it would be most unjust to claim that it did not take effect when he took the oath and would not till the appointee gave a bond.

Seventh Point.

The Petitioner was not called upon to protest against the illegal clause of the appointment.

The next point made by the majority opinion is that the Petitioner was guilty of fraud in being silent. It says that it would be such if the transaction were between individuals. But it seems to us that, if a corporation had passed a resolution directing its President to appoint a Superintendent and had also resolved that his salary should be $2,000 a year, and the Superintendent had been appointed and had performed the duties, if the cor-

poration refused to pay the salary, because the President without authority had written him that the salary would not be paid, the fraud would be on the side of the corporation, not of the Superintendent.

But of course this is no transaction between individuals. The Petitioner and the Secretary were not on equal terms. The Secretary had no right to place the appointee in a position where he would not dare to object to a violation of the law lest (as the Circuit Court says in Miller v. The U. S., 104 Fed. Rep. 415), "he should risk discharge from the office which he already held," or as the Minority Opinion says (fol. 16), "his resignation of the office of Local Inspector might have been called for and the compensation of that office lost to him." And he not only had no right but no legal power to do so.

Eighth Point.

The Petitioner waived nothing—any such waiver is contrary to public policy.

The Majority Opinion also holds that the fact that the Petitioner did not protest against this illegal attempt to deprive him of his salary amounts to a waiver of his right to the salary. And this, as the Minority Opinion says, is the vital question in the case.

On this question we maintain that the claim of the Petitioner is sustained both by public policy and by authority.

"Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept less than the statutory salary is contrary to public policy and should not be tolerated by the Courts." (Miller v. U. S., 103 Fed. Rep. 415).

"It would lead to the gravest abuses, if a candidate and the executive officer who appoints him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed but will not come for less. And if public policy prohibit such a bargain in advance it would seem that a Court should be astute not to give effect to such illegal contract by indirection as by spelling out a waiver or estoppel." Id. Id.

"In the interest of the public service the weight of authority undoubtedly is against the validity of waiving and perhaps of pledging official compensation to accrue for services to be rendered, or to satisfy the same by a less amount, even though a receipt be given for the same (Fisher's Case 15 C. Cls. R. 323)"

In the case of Satterlee v. The Board of Police 75 N. Y., Rep. p. 38 the same rule was laid down by the Court of Appeals of New York. The Board of Police had appointed Satterlee a surgeon, by a resolution which stated that his salary would be $1,500. But the Statute of the State had fixed the salary of such a surgeon at $2,250. Satterlee accepted the appointment of the Board, performed the duties of the office for over two years, drew his

salary as fixed by the Resolution of the Board and sued to recover the rest of the salary fixed by the Statute. And he recovered it.

The Court of Appeals said, "Fixing the amount at a less rate by resolution could not make it less than the Statute declared. There is no principle upon which an individual appointed to a position can be compelled to take less than the salary fixed by law. The acceptance and performance of the duties of the office after appointment is not a waiver of the Statutory provisions fixing the salary therefor, and does not constitute a binding contract to perform the duties of the office at the sum named. The law does not recognize the principle that a board of officers can reduce the amount fixed by law for a salaried office, and procure officials to act at a less sum than the Statute provided, or that such official can make a binding contract to that effect. The doctrine of waiver has no application to any such case, and cannot be invoked to aid the respondent."

The majority opinion of the Court of Claims seeks to avoid this case by saying that " in that case there was no question of the full and complete regularity of the appointment and of the performance of every undiminished duty under it (Record fol. 11)."

The only difference between the appointments in the two cases is that in the Satterlee case, the appointing power sought to *diminish* the salary fixed by the Statute, while in the present case the effort was to *take it away entirely.*

And in this case the Court below has itself found that the Petitioner "performed the duties of said office" for three years and two days (fol. 7).

There is therefore no difference between this case and the Satterlee case.

The case of the U. S. v. Symonds, 120 U. S., 46, is

also an authority to the same effect. In that case the Secretary of the Navy had by a regulation sought to reduce Symond's salary below what the Statute fixed. He continued to perform the duties of the office, accepted the reduced salary as long as he performed them without protest, and then sued to recover the difference. And both the Court of Claims and this Court held that he was entitled to recover.

Ninth Point.

The last paragraph of the Majority Opinion is utterly wrong and shows the carelessness, to say the least, with which the majority considered the case.

The Statute referred to did not apply to the Petitioner but to the Department. Its language is as follows (1 Supplt. to the U. S. Rev. Stat. p. 427): "Hereafter no Department or officer of the United States shall accept voluntary service for the Government."

How the Court could have said that an Act prohibiting any Department or officer of the United States from accepting voluntary service for the Government only related to "employees in the Indian Office" or that the provision forbidding the Secretary to accept voluntary service made the services of the claimant, (which were not voluntary) services rendered "in *his own violation* of the law" is a mystery. If the Judge ever read the provision he most strangely misconceived it.

Tenth Point.

The addition of the words "without additional compensation" in the appointment was beyond the Secretary's power. Such action is not only illegal but dangerous.

It cannot be held that the Secretary of the Treasury had power to repeal Section 9 of the Act of August 7, 1882, so far as the salary of the office was concerned.

It follows logically that the Secretary had no authority to insert in his appointment the words "without compensation;" that those words were void and that the claimant had the right to treat them as such, and that his so treating them was no waiver of anything. We respectfully submit that the doctrine that an appointing officer has power to affix an illegal condition to an appointment, whether it be to increase compensation, to diminish compensation, to withhold compensation, or to require the performance of any other act on the part of the appointee than the performance of the duties of the office, is a doctrine of too great danger to be approved in any way by the Courts of the United States. No appointee to an office should be held bound to any such condition. And the Courts of the United States should not either directly or by any roundabout way of a doctrine of waiver or estoppel give any effect whatever to such illegal action of the appointing power.

The opinion of the two Judges of the Minority of the Court below, supported as it is by the decision of the Circuit Court in the Miller case is far stronger, on grounds both of reason and

authority, than the opinion of the three Judges, who dismissed the petition. The views of the Minority and of the U. S. Circuit Judge should meet with the approval of this Court. And the decision of the Court below should be reversed and judgment in favor of the Petitioner should be decreed.

Eleventh Point.

The decision of the Court of Claims should be reversed and judgment ordered for Petitioner.

ROBERT D. BENEDICT,
Counsel for Appellant.

E. D. MUSSEY,
Solicitor for Petitioner.
Washington, D. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

JOHN GLAVEY, APPELLANT,
v.
THE UNITED STATES. } No. 235.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Prior to the act of August 7, 1882, chapter 441 (22 Stat., 346), no statute authorized the inspection of foreign private steam vessels carrying passengers from ports of the United States to other places or countries. That act amended section 4400 of the Revised Statutes so as to require the inspection of such vessels, and it provided, among other things, for the appointment by the Secretary of the Treasury of sixteen officers to be designated as special inspectors of foreign steam vessels, at a salary of $2,000 a year each, as follows: At the port of New York, six; at the port of Boston, two; at the port of Baltimore, two; at the port of Philadelphia, two; at the port of New Orleans, two; at the port of San Francisco, two. No fees were chargeable for such inspections, and the salaries of

the officers were payable out of a permanent appropriation made by section 6 of the act. Each of the inspectors so authorized was required to take an oath of office and execute a proper bond, to be approved by the Secretary of the Treasury, in such form and upon such conditions as the Secretary should prescribe, for the faithful performance of the duties of his office. Sections 2 to 6 of this act, which authorized the appointment and salaries of these special inspectors of foreign steam vessels, were repealed by the act of March 1, 1895, chapter 146 (28 Stat., 699), after repeated recommendations of the Secretary of the Treasury, on the grounds that the offices so created were "virtually sinecures," and that the inspection of foreign steam vessels could be made by the inspectors of domestic vessels. Secretary Windom so recommended in his Annual Report on the State of the Finances for the year 1889, page cii, and therein stated that the services of three of these officers had already been dispensed with.* By reference to Finding

*The action in Congress upon this recommendation was the introduction of a bill (S. 1752), on January 7, 1890, by Senator Frye, to abolish the unnecessary offices, and for other purposes, which was referred to the Committee on Commerce and favorably reported back on the 16th of the same month (Congressional Record, Senate Report No. 113, Fifty-first Congress, first session). This bill did not become a law, but its provisions for the abolishment of the unnecessary offices were exactly the same as those contained in the above-cited act of March 1, 1895. In regard to the provisions of the bill that became that act, Senator Frye said on February 21, 1895:

> A similar bill passed the Senate three times, and finally the House concluded to take it up, and it has

III (R., 5) and the Annual Report of the Supervising Inspector-General of Steam Vessels for the same year to the Secretary of the Treasury (p. 24) it will be seen that the services of the inspectors of foreign steam vessels at the ports of Philadelphia, New Orleans, and San Francisco had been dispensed with "by an order of the Secretary," on the grounds that their offices "were merely sinecures," and that the "nominal duties" of the offices were being performed by the local inspectors of domestic vessels "acting" as inspectors of foreign steam vessels, the result being a saving of the salaries of the foreign inspectors at those ports.

The like recommendation to abolish all the sinecure offices was made to Congress by Secretary Foster on December 7, 1891, in his Annual Report on the State of the Finances for that year. He said:

> The services of the officers known as special foreign inspectors have been dispensed with, and the work is all done by the officers of the

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passed under suspension of the rules (Congressional Record, Fifty-third Congress, third session, p. 2490).

It is therefore apparent that during the whole period of appellant's term of office as *local inspector of hulls* at New Orleans the Congress was fully informed not only by the annual reports of the Secretary of the Treasury but also by committee reports on bills, that the offices of special inspectors of foreign steam vessels were practically sinecures, and that for that reason they were vacant and the duties thereof were being performed by the regular domestic inspectors without additional compensation. It was for this reason that the offices were not abolished during the Fifty-first Congress. The delay was caused by other amendments required in the inspection laws.

> domestic service under special appointments as acting special inspectors without pay, thereby saving the salaries formerly paid the special inspectors. (Page lxx.)

On April 17 of the last-mentioned year the same Secretary of the Treasury, or his Assistant, had appointed the appellant to the office of local inspector of hulls of steam vessels for the district of New Orleans, La., as set forth in the findings of facts (R., 3, 4); and on May 15 following, the same Secretary directed him, by a letter, which is not in the regular form of an appointment to office, to "serve," in connection with his appointment as *local inspector of hulls* of steam vessels, as a *special inspector of foreign steam vessels*, without additional compensation, for the port of New Orleans (R., 5). Appellant took the oath of office as directed in the letter, and served in that capacity, without protest or objection, until he ceased to hold the office of inspector of hulls, on May 27, 1894, by the appointment and qualification of a successor in that office (R., 7). During that entire period he was not required to give the bond prescribed by the abovesaid act of August 7, 1882, nor did he at any time give or offer to give such bond.

While so performing the duties of inspector of foreign steam vessels, appellant never made any application or demand to be paid the salary prescribed by said act for that office, but, on the other hand, he regularly sent in his monthly accounts for compensation as local inspector of hulls of steam vessels to the Treasury Depart-

ment, and those accounts were settled and paid monthly. (Finding I, R., 4.) He ceased to perform the duties of an inspector of foreign steam vessels on May 27, 1884, when he ceased to hold the office of local inspector of hulls at New Orleans (R. 7), and if he ever held the office of inspector of foreign steam vessels his resignation ~~as such~~ of that officer was never ~~called~~ tendered for, nor was he ever expressly removed therefrom. In this situation of the case appellant sues to recover the salary prescribed by the statute for the office of special inspector of foreign steam vessels at the port of New Orleans, La., but the demand is modestly limited to the period of his tenure of the office of local inspector of hulls.

We supplement this statement by respectfully referring to the following facts not in the record, but of which the court may take judicial notice (*Jones* v. *United States*, 137 U. S., 202, 216), for the purpose of showing a copy of an appointment to the office of special inspector of foreign steam vessels and a copy of an official bond for that office, each in the usual form:

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., December 21, 1882.

Mr. THOMAS H. BARRETT,
New York City, New York.

SIR: Under the provisions of the act of Congress approved August 7, 1882, entitled "An act to amend section forty-four hundred, title fifty-two, of the Revised Statutes of the United

States, concerning the regulation of steam vessels," you are hereby appointed a special inspector of boilers of foreign steam vessels at the port of New York, at a compensation of two thousand dollars per annum, the appointment to take effect from date of oath.

You will execute a bond in the penal sum of three thousand dollars.

Very respectfully,

CHAS. J. FOLGER,
Secretary.

SPECIAL INSPECTOR OF FOREIGN STEAM-VESSELS' BOND.

(Section 4400, Revised Statutes U. S.—Act approved August 7, 1882.)

Know all men by these presents, that we, Thomas H. Barrett, of New York City, principal, and James G. Cooper, of Brooklyn, New York, and Bartholomew Donegan, of Brooklyn, New York, sureties, are held and firmly bound unto the United States of America in the full and just sum of three thousand dollars, money of the United States, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents Sealed with our seals, and dated this twenty-ninth day of December, in the year one thousand eight hundred and eighty-two.

The condition of the foregoing obligation is such, that whereas the said Thomas H. Barrett has been appointed by the Secretary of the Treasury, under the provisions of the act amend-

ing section 4400, Revised Statutes of the United States, approved August 7, 1882, a special inspector of foreign steam vessels at the port of New York, State of New York: Now, if the said Thomas H. Barrett shall well and faithfully perform the duties of the said office as required by law and the regulations of the Treasury Department, and make reports thereof to the Supervising Inspector-General of Steam Vessels, under such regulations as are or may be prescribed by the Secretary of the Treasury, and shall duly account for all money or public property with which he may be intrusted, or which may come into his hands, then this obligation to be of no effect; but otherwise to remain in full force and virtue in law.

THOMAS H. BARRETT. [SEAL.]
JAMES G. COOPER. [SEAL.]
BARTHOLOMEW DONEGAN. [SEAL.]

Sealed and delivered in presence of—
JAMES STROUD.
JOHN A. OSBORN.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, second circuit, do hereby certify that I am well acquainted with the handwriting of John A. Osborn, whose name is subscribed to the annexed affidavits, and that the signature to the same is in his proper handwriting. And I do further certify that he was at the time of signing the same a United States commissioner, duly appointed by

the circuit court of the United States of America for the southern district of New York, second circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court this 29th day of December, in the year of our Lord one thousand eight hundred and eighty-two and of the Independence of these United States the hundred and seventh.

JOSEPH M. DEUEL, *Clerk.*

[Seal of U. S. circuit court, south. dist. New York.]

I, James G. Cooper, being duly sworn, depose and say that I am worth the sum of six thousand dollars over and above all my just debts and liabilities, exclusive of property exempt by law from execution.

JAMES G. COOPER.

Sworn and subscribed before me this 29th day of December, A. D. 1882.

JOHN A. OSBORN,
United States Commissioner, S. D., N. Y.

I, Bartholomew Donegan, being duly sworn, depose and say that I am worth the sum of six thousand dollars over and above all my just debts and liabilities, exclusive of property exempt by law from execution.

BARTHOLOMEW DONEGAN.

Subscribed and sworn before me this 29th day of December, A. D. 1882.

JOHN A. OSBORN,
United States Commissioner, S. D., N. Y.

CITY AND COUNTY OF NEW YORK, *ss:*

I hereby certify that James G. Cooper and Bartholomew Donegan, the sureties in the within bond, are personally known to me; that they are citizens of the United States and residents of Brooklyn, New York, and that they are good and sufficient to pay the penalty of said bond.

W. U. ROBERTSON,
Collector of Customs.

[Instructions.]

The chief officer of customs certifying to the within bond is required to see that the following instructions are particularly observed and complied with, viz:

1st. The Christian names must be written in the body of the bond in full, and so signed to the bond.

2d. A seal of wax or wafer to be attached to each signature.

3d. Each signature must be made in the presence of two persons, who must sign their names as witnesses.

4th. Each surety must make and sign an affidavit of the amount he is worth after paying his just debts, describing his property to the extent of his liability.

5th. The collector or chief officer of the customs must certify that the sureties are sufficient to pay the penalty of the bond.

6th. The affidavits of the sureties must be taken and signed before an officer authorized to administer oaths generally. The officer must certify that he administered the oaths. If the magistrate is not a judge of the United States

court, his authority to administer oaths must be certified by the clerk of a court of record having official knowledge of that fact.

GROUNDS OF DEFENSE.

The argument of the learned counsel for the appellant in this case is based upon the general principle that when an office with a fixed salary has been created by statute, and a person duly appointed to that office has qualified therefor and entered upon the discharge of his duties, he is entitled in law to be paid the salary thereof during his incumbency of the office.

We fully admit this principle, but our contention is that it is not applicable to the case at bar, for the following reasons:

1. It was not the intention of the Secretary of the Treasury to appoint appellant to the office of special inspector of foreign steam vessels at the port of New Orleans when he signed the letter of May 15, 1891. This fact is established by the above-cited annual finance reports to Congress.

2. If the court should consider that letter as a valid appointment to the office of special inspector of foreign steam vessels, nevertheless, as appellant did not at any time qualify therefor as required by law, in that he did not give or tender the official bond prescribed in the act which created that office, his tenure was *de facto* and not *de jure*, and he acquired no legal title to the salary of the office.

3. If the court should consider that the giving of an official bond, or its tender, was not a necessary qualification for said office, nevertheless appellant is not entitled to the salary thereof, because he waived all right and title to that salary by accepting the appointment upon the condition therein stated, and he is now estopped from demanding the said salary.

POINTS OF ARGUMENT.

I.

The so-called appointment to the office of special inspector of foreign steam vessels is on its face merely an administrative direction from the head of the Treasury Department, which imposed upon the appellant, as local inspector of hulls of steam vessels, the duties of a special inspector of foreign steam vessels "without additional compensation." It is wholly defective as a commission in that it expressly withholds one of the necessary incidents of an office of profit, namely, salary. (*United States* v. *Hartwell*, 6 Wall., 385.)

The statement of the Secretary of the Treasury in that letter, that the appointment would "take effect from the date of oath," was evidently made upon the supposition that an official oath was a necessary qualification to enable a local inspector of hulls to perform the duties of a special inspector of foreign steam vessels. Similarly, the statement that appellant would not be entitled to additional compensation for the performance of those duties was unnecessary, because, as the honorable court are well aware, it is a common and

lawful practice in the various Executive Departments of the Government for the heads thereof to require one officer to perform the duties of another office during the absence or disability of its incumbent, or a vacancy therein, or where upon economical grounds the office may be left in abeyance. In such case it must be assumed that the head of the Department acted according to the interests and requirements of the public service.

Although it is generally conceded that public offices should not be left in abeyance, nevertheless the practice referred to is recognized in the various statutes which prohibit the payment of extra compensation in such cases to the officer performing the duties of the other office (Rev. Stats., 1763–1765). Therefore there can be no question whatever respecting the legality or propriety of the practice, or of the validity of the notice to the claimant that he would not be allowed any extra compensation. Indeed, as above stated, the notice was wholly unnecessary, because the statutes expressly forbid extra compensation in all such cases. The question of the right to the salary of the other office has been so often before this court that it would be a waste of time to dwell upon this feature of the case.

THE ISSUE.

Practically the issue resolves itself into the question: Did the Secretary of the Treasury intend to appoint appellant to the office of special inspector of foreign steam vessels? Evidently the answer must be that the letter of the Secretary is not such an appointment

or commission as the law contemplated, because it expressly excluded one very important feature which otherwise might be implied, namely, the right to the emoluments of the office. In this view of the case, and as showing the intention of the Secretary not to make an appointment to the office in the legal sense of the term, there is the fact that the letter of May 15, 1891, is not in the usual form of an appointment to that office (see usual form, *ante*); and that he did not require a bond;—a security which he could not waive under an appointment to the office—and also the fact that he and his predecessor, Secretary Windom, reported to Congress that the office would remain vacant. Besides this, there is the additional fact that appellant himself never regarded the letter as an appointment to office. The proof of that fact is his conduct; he never made any demand for the salary of the office while he acted in the capacity of special inspector of foreign steam vessels, and he never attempted to fully qualify as a duly appointed officer by giving, or at least tendering, the official bond prescribed by the statute. In addition to this is the fact that during the whole period for which the salary is now claimed he promptly and regularly demanded and was paid each month his salary as local inspector of hulls of steam vessels. And in addition to all this, the fact is that when he ceased to hold the last-mentioned office by the appointment and qualification of a successor therein, he at no time thereafter claimed or pretended to hold the office of special inspector of foreign steam

vessels or performed or offered to perform any of its duties. On the contrary, when he ceased to hold the office of local inspector of hulls, he did not regard said letter of May 15, 1891, as authorizing him to continue to perform the duties of a special inspector of foreign steam vessels, although he never resigned that office or was removed therefrom.

II.

If the court should consider that the above-mentioned letter was a valid appointment to the office of special inspector of foreign steam vessels, the most that can be said of appellant's position is that he was an officer *de facto* and not *de jure*, because he did not qualify, as the statute required, by giving an official bond or tendering it.

In *Williams* v. *United States* (23 C. Cls. R., 46), the Court of Claims held that until an official bond is given, when that security for official conduct is prescribed by statute, the appointee to an office is not invested with the office or entitled to the salary thereof. In that case the claimant had offered to comply with all the conditions of the statute, and his counsel admitted that while the provision for the giving of an official bond should be considered as directory, nevertheless it is a condition precedent to the vesting of a legal right to the emoluments of the office. "In this view," said he, "the requirement of giving a bond can be regarded as of no higher dignity than as a part of the contract upon which the salary can be paid."

Again, in *Delaney* v. *United States* (31 C. Cls. R., 44, 61), the same court quoted with approval the language of the Attorney-General in an opinion requested by the State Department respecting a consular office, in which he said:

> Every person appointed to an office of that kind has preliminary duties to perform before he leaves the country; and after he has taken the official obligation in the manner prescribed by law, as by making oath and giving bond, the time and labor devoted to these preliminary duties, as well as the time occupied in reaching his official post, are just as much spent in the public service as though he were already at that post exercising its more important functions.

Here we see that the making of an oath and the giving of a bond are considered as "official obligations," and that the appointee is not regarded as an officer *de jure* until those obligations have been taken. But he is an officer *de jure* when he qualifies by taking the oath and giving the bond. (*United States* v. *Delaney*, 164, U. S., 282, 284; and *The Queen* v. *The Mayor of Cambridge*, 12 Ad. and Ell., 702, 712.)

It is true that in *United States* v. *Bradley* (10 Peters, 343), *United States* v. *Linn* (15 ib., 290), *United States* v. *Le Baron* (19 How., 73), and other cases that might be cited, the statute expressly prescribed that the bond should be given *before* entering upon the duties of the office, and that this court held that the requirement was directory, and that the right to salary vested from the date of entry on duty. Nevertheless it is to be remembered that in all such cases official bonds were given

within a reasonable time, and we have no case in the reports which holds that the giving of an official bond, when required by statute, is not one of the necessary qualifications for full investure of office and right to salary, nor any case where it is held that when the appointee failed or refused to give the statutory bond he was an officer *de jure*, and as such entitled to the salary and emoluments of the office. Again, it is to be observed that in all suits on official bonds there is a recital in those instruments that the principal has been appointed to the office named therein; therefore the sureties were estopped from pleading that he was not such an officer until his bond was accepted.

Nor upon the point in issue can the case of *United States* v. *Eaton* (169 U. S., 331) be distinguished from those cases, because in each an official bond had been given within a reasonable time after appointment, the taking of oath of office, and the entry of the incumbent upon his official duties. In fact, Eaton gave two official bonds. He was appointed to office on June 23, 1892, took the oath of office the same day, and entered upon the full discharge of his duties on July 12, 1892. He gave the first bond on September 2, 1892, and the second on January 24, 1893—each by directions from the State Department; and by the same directions, and with the consent of the sureties, each bond was dated back to June 13, 1892—that being the day when he began to act in the office at the request of Boyd, the minister resident and consul-general of the United States, who was then taken seriously ill and so continued until July 12, 1892, when he departed on his

voyage home to the United States, and left Eaton in full charge of the office.

It was contended for the appellants in that case that the Court of Claims erred in giving judgment in favor of Eaton for salary "for a period during which he performed the duties of the office before his official bond was received and approved." The Court of Claims had allowed compensation to Eaton for the period from July 12, 1892, and this court affirmed that allowance.

If there be anything in the language of the learned opinion delivered by Mr. Justice White in that case which might be construed as holding that the giving of an official bond prescribed by statute is so merely directory that compliance with the statute is not a necessary qualification for office, and that the bond may be wholly dispensed with in respect to the incumbent's right to the salary of the office, it is to be remembered that the language of judicial opinions is to be confined to the subject-matters discussed in them. To so hold would leave a loophole for an evasion of the statute not contemplated by Congress.

In *United States* v. *Linn* (15 Peters, 313) this court evidently regarded the giving of an official bond, when required by statute, or other security equivalent thereto, as a condition precedent to the full investiture of office. In that case, referring to *United States* v. *Bradley*, Mr. Justice Thompson, delivering the opinion of the court, said:

> According to this doctrine, which is undoubtedly sound, Linn was a receiver, *de jure* as well

> as *de facto*, when the instrument in question was given. And although the law requiring security was directory to the officers intrusted with taking such security, Linn was under a legal as well as moral obligation to give the security required by law.

The court considered that the instrument given was a sufficient compliance with the statute, although it was not sealed.

In *United States* v. *Flanders* (112 U. S., 91), referring to a statute which required an oath of office and bond before entry upon the duties of an office, Mr. Justice Blatchford, delivering the opinion of the court, said:

> But, we are of opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or appropriate the commissions as compensation does not arise until he takes and subscribes the oath or affirmation, but that when he does so his compensation is to be computed on moneys collected by him from the time when, under his appointment, he began to perform services as collector, which the Government accepted, provided he has paid over and accounted for such moneys.

In that case the official bond was given when the oath was taken. Therefore it may be said, when 'the official bond is given, the statute is satisfied by holding that the officer is entitled to be paid his salary for the period during which he performed the duties of his office.'

In principle there can be no distinction between a case where the statute prescribes *generally* the taking

of an oath or the giving of a bond as a qualification for office, and one where the statute expressly directs an oath to be taken or a bond to be given *before* entering upon the duties of an office. Where, as in the case at bar, the statute is silent as to the time for giving the bond, it must be complied with as fully as if it had prescribed the time for giving it. The statute contemplates in either case that the officer should be under certain obligations in regard to the performance of his official duty, namely, the sanction of an oath of office and a bonded liability, and until the statute is satisfied the incumbent is not an officer *de jure*. Speaking of qualification for office in the case of *United States* v. *Delany* (164 U. S., 282, 284), this court said of appellee, "He had qualified by taking the oath of office and giving the bond required by law."

The learned counsel for appellant argue in their brief (p. 14) that it would be "a dangerous proposition" to hold that when an official bond is required by statute in respect to an office, the appointee is not an officer *de jure* until he gives the bond, because it would "lend countenance to any such defense for defaulting officers of the United States." The very next paragraph of the brief is a sufficient answer to the supposed danger: "The contrary has been held even when the statute required a bond to be given *before entering* on the duties of the office." Of course a *de facto* officer is under legal liabilities, and is responsible for his conduct in the office. This is also the answer to the suggestion in the dissenting opinion (R., 17) that "The

Secretary's letter of appointment should not be construed as an order assigning to duty a man who was not an inspector in law or in fact to examine the vessels of private owners and subject them to the 'visitation' and penalties prescribed by the Revised Statutes, sections 4407, 4418, 4421, 4423, and 4424." It is an everyday occurrence for a duly designated officer to perform the duties of a vacant office. As to the latter office he is, of course, the officer *de facto* for the time being, and can exercise all its functions, and by the express statutory provisions, above cited, he has no right to the emoluments of the vacant office. It is therefore unnecessary to contend that, as a principle of law, a mere *de facto* officer is not entitled to the salary of the office. No one ever supposed that in such a case the *de facto* officer acted under duress.

III.

If the appellant was in fact legally appointed to the office of special inspector of foreign steam vessels, and if the Secretary of the Treasury had the power to waive the giving of an official bond prescribed by statute, or if the failure of appellant to give or offer to give an official bond did not debar him from claiming the salary of that office, nevertheless he can not now recover the salary claimed, because he accepted the appointment upon the express condition that he would serve as a special inspector of foreign steam vessels *without additional compensation in connection with his appointment as local inspector of hulls of steam vessels.*

There is no question here of the right to hold two compatible offices and be paid the salary of each office. (*United States* v. *Saunders*, 120 U. S., 126.) The facts in this case present an entirely different question, namely, Whether when the head of a Department, in a letter in the form of an appointment addressed to a subordinate officer having a fixed salary, directed the latter to perform the duties of another compatible salaried office which was regarded as a sinecure, without compensation in connection with his own office, and that officer, without any objection or protest whatever, proceeded to perform the few additional duties so imposed upon him, and by his conduct leads the head of the Department to believe that he has agreed to the conditions named in the letter, and then performed the additional duties in connection with his regular official duties for a period of three years and twenty-seven days without claiming any salary or other compensation during that time for the performance of those occasional duties, the law vests the officer with the right to recover the salary of the other office?

Of course, there can be but one answer to this question, namely, that, in such case, the statutes expressly forbid the payment of any compensation whatever to the officer in addition to his regular salary.

ESTOPPEL.

But assuming for a moment that, by literal construction, the letter of May 15, 1891, may be regarded as a commission or appointment to the office of special inspector of foreign steam vessels, and that the

Secretary of the Treasury had no legal right to exact a condition that the appointed officer must serve without salary, does it follow, on the facts of the case, that the claimant can now recover the salary of the office? We submit that he can not, because—

1. He never qualified as an officer *de jure*.

2. He is estopped from now claiming said salary.

It is unnecessary to further argue the first objection. If it should be held untenable, the second objection must stand.

The doctrine of estoppel is not favored, nevertheless it is often enforced. The books are full of cases where parties, by their silence or misleading conduct, were held to have waived their legal rights. It is true that, as a general rule, a waiver will not stand against an illegal contract, or against public policy, or without some valuable consideration to sustain it, and it has been said that the maxim "Silence shows consent" has been much abused. (*Hatch* v. *Benton*, 6 Barb., 35.) Nevertheless it is a rule, both of law and equity (*Wehrman* v. *Conklin*, 155 U. S., 314, 327), that when a party by his silence seems to consent to a waiver of his right, and has thereby misled the other party, he is estopped from asserting the right. Can any good reason be given why this rule should not be in force in respect to executive administration as well as judicial proceedings? It is true that in the former no one is authorized to waive the rights of the Government without the authority of a statute. But there can be no question that an individual can waive his own rights—even constitutional rights, much more a statutory right. (*In re Belt*, 159

U. S., 95, 99.) For example, in judicial proceedings certain well-secured rights are often waived, and held as waived, because not seasonably asserted. Diligence and good faith so require. Even in criminal cases waiver by silence is sustained against defendants when they go on trial without a copy of the indictment or of the panel of the jury, or when counsel was not assigned to them, or by becoming witnesses in their own behalf, or where the jury was not polled, or when former jeopardy was not pleaded. If it should be said that the agreement between the Secretary and appellant was an illegal contract, and that therefore the latter is not estopped from demanding the salary now claimed, the answer is—if we consider the matter as a contract at all—that appellant voluntarily agreed to its terms; he was as much a party to it as the Secretary of the Treasury; he has not pleaded duress; and certainly, without an express finding of duress as a fact in the case, this court will not assume that Secretary Foster ever put any subordinate officer of his Department in fear of dismissal from office without aggravated cause therefor. It is rather to be assumed that appellant was quite willing to comply with the Secretary's instructions in every respect. But where is there any illegality in such a contract? It would be new doctrine in this court that an agreement between a salaried officer and the head of his department to perform the duties of another office without additional compensation is an illegal contract, or in any respect in contravention of public policy, in view of the statutes which expressly recognize such agreements.

There is no case in the reports to sustain the proposition that the incumbent of a sinecure office can not waive his right to the salary thereof.

We do not admit that the question of contract or of waiver arises on the merits of this case; but if the court should determine otherwise, our defense is no less valid.

It is but stating elementary law to say that waiver is a voluntary relinquishment of some right, a foregoing or giving up of some benefit or advantage which, but for such waiver, one would have enjoyed.

The question of waiver is therefore to some extent a question of fact. It may be proved by various species of proofs and evidence, by express declarations, or by acts manifesting an intent and purpose not to claim an advantage, by nonfeasance, or forbearing to claim or act, or by a course of acts and conduct to induce a belief that there was an intention and purpose to waive the right or advantage. Voluntary choice not to claim is of the essence of waiver and not mere negligence, though from *negligence unexplained* such intention may be inferred. This is the law of waiver as expounded by Chief Justice Shaw in *Farlow* v. *Ellis and another* (15 Mass., 229, 231).

And the same doctrine is stated in *Simmons* v. *Burlington, etc., Railway Co.* (159 U. S., 278, 291). Mr. Justice Shiras, delivering the opinion of this court in that case, said:

> The rule is aptly expressed by 2 Pomeroy's Eq. Jur., par. 816, as follows: "Acquiescence is

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an important factor in determining equitable rights and remedies in obedience to the maxims: He who seeks equity must do equity, and he who comes into equity must come with clean hands. Even when it does not work a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel—may produce a *quasi* estoppel—upon the rights of remedy." And in par. 965: "When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. Even where there has been no act nor language properly amounting to an acquiescence, a mere delay, a mere suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands; laches are often a defense wholly independent of the statute of limitations."

In the case at bar we have the very essence of a waiver: Voluntary choice to accept an appointment to an office with a salary attached to it by law, and a tacit agreement not to claim that salary as long as he would be called upon to perform the mere nominal duties of that office in connection with another office for which he was being paid a competent salary.

If the honorable court should determine that in contemplation of law the appellant was appointed to and fully qualified for the office of special inspector of foreign steam vessels, they must, we respectfully submit, also conclude that he waived all right, title, and interest to and in the salary of that office, and that he is now estopped from maintaining a suit therefor against the United States. Acquiescence and waiver are always questions of fact, and the conclusion of the court below is necessarily based either upon that fact or the fact that appellant was never appointed to the office of special inspector of foreign steam vessels. No attempt has been made to explain his long silence in respect to the salary now claimed. If, while in office as local inspector, he considered that he had a legal right to the salary of the other office, why did not he demand it in seasonable time? It is not enough for him to say that the law allowed him the right to sue for it within the statutory period of six years from the time it became due.

The statutes, not to speak of general principles, require diligence and good faith on the part of public officers in the matter of rendering accounts for the pay-

ment of their salaries. It is expressly prescribed that salary accounts should be rendered to the officers whose duty it is to pay them, and that the latter shall render their disbursement accounts to the accounting officers at the end of each quarter of the fiscal year, to be settled promptly, so that the Secretary of the Treasury may be enabled to render to Congress each year a report of the expenditure of all moneys appropriated for the public service for the preceding fiscal year. The Secretary is charged by law to "cause all accounts of the expenditure of public money to be settled within each fiscal year, except when the distance of the places where such expenditure occurs may be such as to make further time necessary." (Rev. Stat., secs. 250, 3622, 3625.)

The statutes are very stringent in their requirements for the prompt settlement of all accounts and claims for which appropriations are annually made by Congress. No explanation consistent with good faith has been made of appellant's conduct in so carefully refraining for over three years from rendering monthly to the Treasury Department accounts for the salary of a special inspector of foreign steam vessels. His silence was wholly inconsistent with any other theory than that he never regarded the letter set forth in the findings of fact as an appointment to any office. He never presumed for a moment to act as such officer after he ceased to hold the office of local inspector of hulls. He carefully refrained, while he held the office of local inspector of hulls, from giving the Secretary of the

Treasury the slightest intimation that he considered himself as legally possessed of the office of a special inspector of foreign steam vessels. He never had a thought that he held that office until he ceased to perform its duties. He never up to that time thought that he had been appointed to it, because if it had occurred to him he would have continued to perform its duties until formally removed from it, and he never was. The claim for salary was an afterthought, suggested by the idea that possibly it might be held, by some legal technicality, that the letter of the Secretary might be construed as an appointment to office and that the condition to serve without salary would be held illegal, and therefore that he might possibly recover a judgment for the salary in the Court of Claims.

IV.

There is a reference in the majority opinion, and also in the dissenting opinion sent up with the record, to the provision of the urgent deficiency act of May 1, 1884 (23 Stat. L., 17), which says that—

> Hereafter no department or officer of the United States shall accept voluntary service for the Government * * *.

This prohibition has no application to the present case, but if it had, it would bear against the appellant, because he could found no legal right on a violation of law to which he was himself an agreeing party. The prohibition was an amendment of the House bill, put on in the Senate with the avowed purpose of supplementing that provision in the legislative, executive,

and judicial appropriation act of March 3, 1883, sec. 4 (22 Stat. L., 531, 563), which says—

> That the heads of the departments may by special order, stating the reason, further extend or limit the hours of service of any clerk or employee in their departments, respectively, but in case of an extension it shall be without additional compensation. * * *

This was the explanation of the amendment which was made by Mr. Randall, who had charge of the bill in the House, and that body then receded from their objection to it (Cong. Rec., Forty-eighth Congress, first session, pp. 2143, 2219, 3392, 3410). While the amendment would seem to have been unnecessary legislation, in view of the former prohibition, it certainly was not intended to create or enlarge or sanction any right to salary or extra compensation in any case. It was intended to discountenance the practice of some industrious clerks of unnecessarily working beyond office hours in the Departments, and then making such extra work an equitable foundation for a claim upon Congress for additional compensation. It resembles the eight-hour law in some respects—work overtime is discountenanced and no pay is permitted for overtime work, whether rendered voluntarily or by direction of the head of a Department.

To sum up the grounds of defense we say,—with the very highest respect for the strong dissenting opinion in the court below, supported as it is by the concurrence of the learned circuit judge in *Miller* v. *The*

United States (104 Fed. Rep., 415), and with full appreciation of the able argument of the distinguished counsel on the other side,—that the appellant never was appointed to the office of special inspector of foreign steam vessels. But if this honorable court should hold otherwise, to wit, that he was legally appointed to that office, then our defense is that he never qualified for the office, that he waived all right and title to the salary prescribed by law therefor, and that he is therefore estopped from maintaining this suit.

Respectfully submitted.

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Assistant Attorney-General.

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Supreme Court of the United States.

No. 235.—October Term, 1900.

John Glavey, Appellant, vs. The United States. } Appeal from the Court of Claims.

[May 27th 1901.]

Mr. Justice Harlan delivered the opinion of the Court.

This action was brought May 22d 1897 to recover from the United States the sum of $6,011.98, which amount the plaintiff Glavey, who was formerly a local inspector of vessels at New Orleans, alleged that he was entitled to receive for services performed by him as a special inspector of foreign steam vessels at the same city, at the rate of two thousand dollars per annum from May 25th 1891 to May 27th 1894.

The Court of Claims dismissed the petition. The majority of that court were of opinion that under the terms of his appointment the plaintiff was precluded from demanding compensation for any services performed by him as special inspector of foreign steam vessels. The minority were of opinion that the statute having fixed the salary of a special inspector of foreign steam vessels, it was beyond the power of the Secretary, in whom was vested the power of appointment, to prescribe as a condition of the plaintiff's appointment that he should serve as such special inspector without compensation beyond that received by him as a local inspector. 35 *Ct. Cl.* 242.

By section 4400 of the Revised Statutes of the United States, Title "Regulation of Steam Vessels," as the revision stood prior to August 7th 1882, it was provided: "All steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this Title."

Section 4415 of the same title relates to local boards of inspectors and the appointment of local inspectors.

Section 4400 was amended and enlarged by the act of Congress approved August 7th 1882, c. 441, by adding at the end of that section these words: "And all private foreign steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of sections 4417, 4418, 4421, 4422, 4423, 4424, 4470, 4471, 4472,

4473, 4479, 4482, 4488, 4489, 4496, 4497, 4499 and 4500 of this Title and shall be liable to visitation and inspection by the proper officer, in any of the ports of the United States, respecting any of the provisions of the sections aforesaid." 22 *Stat.* 346.

By that act it was further provided that for the purpose of carrying into effect its provisions "the Secretary of the Treasury shall appoint officers to be designated as special inspectors of foreign steam vessels, at a salary of two thousand dollars per annum each, and there shall be appointed of such officers at the port of New York, six; at the port of Boston, two; at the port of New Orleans, two; and at the port of San Francisco, two," § 2; that "the special inspectors of foreign steam vessels shall perform the duties of their office and make reports thereof to the Supervising Inspector General of Steam Vessels, under such regulations as shall be prescribed by the Secretary of the Treasury," § 3; that "each special inspector of foreign steam vessels shall execute a proper bond, to be approved by the Secretary of the Treasury, in such form and upon such conditions as the Secretary may prescribe, for the faithful performance of the duties of his office," § 4; that "the Secretary of the Treasury shall procure for the several inspectors heretofore referred to such instruments, stationery, printing, and other things necessary, including clerical help, where he shall deem the same necessary for the use of their respective offices, as may be required therefor," § 5; and that "the salaries of the special inspectors of foreign steam vessels and clerks provided for, together with their traveling and other expenses, when on official duty, and all instruments, books, blanks, stationery, furniture, and other things necessary to carry into effect the provisions of this act, shall be paid for by the Secretary of the Treasury, out of any moneys in the Treasury not otherwise appropriated," § 6. 22 *Stat.* 346.

The judgment of the Court of Claims was based upon a finding of facts which is here given in full:

"I. The claimant, a citizen of the United States, residing at New Orleans, La., was, on the 17th day of April 1891 duly appointed, pursuant to Revised Statutes, section 4415, to the office of local inspector of hulls of steam vessels, for the district of New Orleans, La., and on April 21st 1891 he accepted said appointment and duly qualified by taking the prescribed oath of office and by forwarding the same together with the official bond prescribed by law therefor to the Treasury Department. He then and there entered upon the discharge of his duties and continued to discharge the same until May 27th 1894. During the claimant's incumbency of said office he claimed each month the salary thereof by rendering his accounts therefor, which were promptly paid by the defendants.

"II. The report of the supervising inspector general for the fiscal year ending June 30th 1889 recommended:

'That sections 2 to 6, inclusive, of the amendment to section 4400, Revised Statutes, which provides a separate set of officers and clerks for the inspection of foreign steam vessels, be repealed, the reasons for the creation of such offices having ceased to exist upon the passage of the act approved June 19th 1886, which abolished the fees formerly collected from domestic steam vessels and their licensed officers, which fees were permanently appropriated previously for the support of the domestic inspection service and which could not legally be diverted therefrom for the support of officers and clerks inspecting foreign steam vessels, from whom no fees could legally be collected for such support. The action of Congress in the matter of creating the separate offices was based on the reasons given in the following extract from the special report of the supervising inspector general, dated January 21st 1882: '. . Authority should be given the Secretary of the Treasury to appoint these special inspectors and to pay their salaries, . . per annum, and necessary traveling expenses, from funds appropriated from moneys in the Treasury not otherwise appropriated, as it would seem obviously improper that such special officers should be paid from the appropriation for the salaries and expenses of steamboat inspection from funds collected by a tax on American steamboat owners and the licensed officers of such vessels.' As the officers and clerks of both services are now paid from funds in the general Treasury, the advantage of uniting the two services must be clearly obvious, both as to public interests and economy in conducting the service. In the latter respect a saving can be made of all the salaries now being paid, except at the port of New York, where two of the officers and the clerk might be retained by transfer to the domestic service, dispensing with the services of the other two now employed. The inspectors at San Francisco, Boston, Philadelphia, Baltimore and New Orleans could be dispensed with altogether, thereby saving to the Government the sum of $14,000 annually, the total of salaries now paid those officers. The additional work that would fall upon the domestic service by such dispensation would be as follows: At New York, 138 steamers; San Francisco, 11; Boston, 18; Portland, Me., 7; Philadelphia, 8; Baltimore, 10; Port Huron, 3; Marquette, 11; Buffalo, 8; Oswego, 22; Burlington, Vt., 3; Detroit, 2; New Orleans, 16. Total steamers, 257.'

"III. By the finance report of the Secretary of the Treasury to the Speaker of the House of Representatives, first session Fifty-first Congress (1889), it was recommended 'that all laws be repealed which provide a separate establishment for the inspection of foreign steam vessels, and that the inspectors of domestic steam vessels be authorized and required to perform all necessary services in connection with the inspection of foreign steamships. The offices proposed for abolition are virtually sinecures, and until they are abolished the Executive will remain subjected to importun-

ity to fill them. The services of three of these officers have been dispensed with.' The three offices disposed of were those at San Francisco, Cal., New Orleans, La., and Philadelphia, Pa.

"IV. While the claimant was holding the office aforesaid, to wit, May 25th 1891, he received from the Secretary of the Treasury a communication, of which the following is a true copy, viz: 'Treasury Department, Office of the Secretary, Washington, D. C., May 15, 1891. Mr. John Glavey, New Orleans, Louisiana. Sir: Under the provisions of an act of Congress, approved August 7th 1882, entitled 'An act to amend section 4400 of title LH of the Revised Statutes of the United States, concerning the regulation of steam vessels,' you are hereby appointed to serve in connection with your appointment as local inspector of hulls of steam vessels, as a special inspector of foreign steam vessels, without additional compensation, for the port of New Orleans, Louisiana, the appointment to take effect from date of oath. Respectfully yours, Charles Foster, Secretary.'

"V. May 25th 1891 the claimant took the oath therein referred to, which was in the usual form of an oath of office, and transmitted the same to the Secretary of the Treasury on that date. He was not required to and did not give or offer to give the bond prescribed by statute for the office of special inspector of foreign steam vessels. From the time of taking the oath aforesaid until May 27th 1894 the claimant performed the duties of a special inspector of foreign steam vessels at said port.

"VI. During the time the claimant was performing the duties of special inspector of foreign steam vessels, as aforesaid, he made no request or demand upon the Secretary of the Treasury or any other officer of the defendants, to be paid the salary prescribed by law for the incumbent of the office of special inspector of foreign steam vessels at said port, nor did he when he subscribed the oath as aforesaid; nor did he at any time thereafter while he held said office of local inspector of hulls of steam vessels, for which he was paid as aforesaid, make to the Secretary of the Treasury or to any other officer of the Government any protest or objection whatever to the performance of the duties of special inspector of foreign steam vessels in connection with his appointment as local inspector of hulls of steam vessels at said port without additional compensation.

"VII. Prior to the time the claimant ceased to perform the services aforesaid he received from the acting Secretary of the Treasury a communication of which the following is a true copy: 'Treasury Department, Office of the Secretary, Washington, D. C., December 15, 1893. Mr. John Glavey, inspector of hulls of steam vessels, New Orleans, La. Sir: Department letter of the 7th instant requesting you to tender your resignation as inspector of hulls of steam vessels for the tenth district is hereby revoked, and you are requested to tender your resignation as inspector of hulls of

steam vessels for the district of New Orleans, La., also as special inspector of foreign steam vessels for the port of New Orleans, La., to take effect upon the appointment and qualification of your successor. Respectfully yours, W. E. Curtis, Acting Secretary.' Thereafter he received from the acting Secretary another communication, of which the following is a copy: 'Treasury Department, Office of the Secretary, Washington, D. C., April 14, 1894. Mr. John Glavey, inspector of hulls of steam vessels, New Orleans, La. Sir: Your services as inspector of hulls of steam vessels for the district of New Orleans, La., are hereby discontinued, to take effect upon the appointment and qualification of your successor. Respectfully yours, S. Wike, Acting Secretary.' And, thereafter, May 28th 1894, the claimant's duly appointed and qualified successor as local inspector of hulls of steam vessels entered upon the discharge of the duties of said office, after which the claimant ceased to perform the duties of said office. The claimant performed the duties of said office as special inspector of foreign steam vessels until said May 26th 1894, a period of three years and two days."

The learned Assistant Attorney General admits it to be a general principle that when an office with a fixed salary has been created by statute and a person duly appointed to it has qualified and entered upon the discharge of his duties, he is entitled during his incumbency to be paid the salary prescribed by statute. He insists, however, that this principle is not applicable in the present case because, he contends, the Secretary of the Treasury did not mean, by his letter or communication of May 15th 1891, to appoint Glavey to the office of special inspector of foreign steam vessels at the port of New Orleans.

We cannot sustain this contention. Section 4400 of the Revised Statutes was so amended by the act of August 7th 1882 as to bring foreign steam vessels within the provisions of certain other specified sections; and by the same act, and for the purpose of carrying its provisions into effect, the Secretary of the Treasury was directed to appoint special inspectors of foreign steam vessels at designated ports, one of which was the port of New Orleans. In view of the express words of the act, his failure or refusal to appoint might have been regarded as a failure or refusal to discharge a duty distinctly imposed upon him by statute. And that seems to have been the view of that officer, for although he had officially declared to Congress that the office of special inspector of foreign steam vessels was virtually a "sinecure," he shows by his communication of May 15th 1891 that he regarded the act of August 7th 1882 as mandatory, and that he appointed Glavey in obedience to its provisions. As he had no authority to appoint Glavey except in virtue of that act, we cannot assume that he

proceeded or intended to proceed outside of its provisions. We must take it that he meant just what he plainly and expressly declared, and consequently that he intended, in virtue of the authority given by the act of 1882, to appoint Glavey to the office of special inspector of foreign steam vessels at New Orleans.

The next contention of the Government is that if the communication of May 15th 1891 is to be taken as showing a valid appointment to the office in question, Glavey did not legally qualify as special inspector in that he did not give or tender the bond prescribed by section 4 of the act of 1882; consequently, it is argued, he was at most only an officer *de facto.*

Is it true that the execution of the required bond was necessary in order that Glavey could lawfully proceed in the discharge of the duties of the office to which he was appointed?

Some light is thrown upon this question by *United States* v. *Bradley*, 10 *Pet.* 343, 357, 364. That was an action upon a bond of one who acted as paymaster in the army. The act under which the bond was taken provided that "all officers of the pay, commissary and quartermaster's department, shall, previous to entering on the duties of their offices, give good and sufficient bonds to the United States, fully to account for all moneys and public property which they may receive, in such sum as the Secretary of War shall direct." 3 *Stat.* 298, *c.* 69, § 6. This court, speaking by Mr. Justice Story, after observing that the proper officers of a department to which the disbursement of public moneys was entrusted could take a valid bond to secure the Government in respect of such moneys, said: "Before concluding this opinion, it may be proper to take notice of another objection raised by the third plea, and pressed at the argument. It is that Hall was not entitled to act as paymaster until he had given the bond required by the act of 1816, in the form therein prescribed; and that not having given any such bond, he is not accountable as paymaster for any moneys received by him from the Government. We are of a different opinion. Hall's appointment as paymaster was complete when his appointment was duly made by the President and confirmed by the Senate. The giving of the bond was a mere ministerial act for the security of the Government, and not a condition precedent to his authority to act as paymaster. Having received the public moneys as paymaster, he must account for them as paymaster."

The doctrine announced in that case was reaffirmed in *United States* v. *Linn*, 15 *Pet.* 290, 313, which was an action upon a writing obligatory given by a receiver of public moneys in a certain land office. The case came before this court upon questions in respect of which the judges of the Circuit Court were divided. Those questions were: 1. Whether the obligation of the receiver and his sureties, being without seal, was a bond within the act of Congress of May 10th 1800, which provided that a receiver of

public moneys for lands of the United States "shall, before he enters upon the duties of his office, give bond, with approved security . . for the faithful discharge of his trust." 2 *Stat.* 73, 75, *c.* 55, § 6. 2. Whether such an instrument was good at common law. The court, speaking by Mr. Justice Thompson, and referring to the emoluments which the receiver was entitled to have, said: "These emoluments were the considerations allowed him for the execution of the duties of his office; and his appointment and commission entitled him to receive this compensation, whether he gave any security or not. His official rights and duties attached upon his appointment. This was so held by this court in the case of *United States* v. *Bradley*, 10 *Pet.* 364." After stating what had been decided in that case, the court proceeded: "According to this doctrine, which is undoubtedly sound, Linn was a receiver *de jure*, as well as *de facto*, when the instrument in question was given."

In *United States* v. *Le Baron*, 19 *How.* 73, 78, the question was as to the time when a person nominated and confirmed as a deputy postmaster, and whose commission was put into the hands of the Postmaster General for delivery to the appointee, was to be deemed to have been invested with such office. This court, speaking by Mr. Justice Curtis, said: "When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the Executive; all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete."

It may be here observed that the above cases are stronger than the present case in that the act of 1882 contained no provision requiring a special inspector of foreign steam vessels to execute a bond before entering on the duties of his office. We observe also that the principles announced in the *Bradley* and *Linn* cases were recognized in *United States* v. *Eaton*, 169 *U. S.* 331.

In view of the former decisions of this court, it cannot be held that the execution by Glavey of the bond required by the act of 1882 was a condition precedent to his right to exercise the functions of the office to which he was appointed by the Secretary of the Treasury. Congress did not so direct. His appointment was complete, at least, when he took the required

oath and transmitted evidence of that fact to the Secretary. After taking the oath, evidencing thereby his acceptance of the appointment, he was entitled to proceed in the execution of the duties of his office and became liable for any failure to properly discharge them.

It remains to inquire whether, by reason of the statement in the Secretary's letter or communication of May 15th 1891 that the appointment in question was "without additional compensation" beyond that received by the appointee as local inspector of hulls of steam vessels, Glavey was estopped to demand the salary fixed by the act of 1882 for special inspectors of foreign steam vessels.

In *United States* v. *Symonds*, 120 *U. S.* 46, 49, the question was whether certain services were performed "at sea" within the meaning of section 1556 of the Revised Statutes fixing the pay of lieutenants in the navy when at sea, or when on shore duty, or when on leave or waiting orders. Symonds claimed that the services for which he sued were performed "at sea," and that he was entitled to the compensation fixed by the statute for services of that kind. This court said: "If the regulations of 1876 had not recognized services 'on board a practice ship at sea' as sea services, the argument on behalf of the Government would imply that they could not be regarded by the courts, or by the proper accounting officers, as sea services; in other words that the Secretary of the Navy could fix, by order and conclusively, what was and was not sea service. But Congress certainly did not intend to confer authority upon the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was in fact sea service, or to increase his compensation by declaring that to be sea service which was in fact shore service. The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of or supplemental to, but not in conflict with, the statutes defining his powers, or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent with *Gratiot* v. *United States*, 4 *How.* 80, and *Ex parte Reed*, 100 *U. S.* 13, upon which the Government relies. Referring in the first case to certain army regulations, and in the other to certain navy regulations, which had been approved by Congress, the court observed that they had the force of law. See also *Smith* v. *Whitney*, 116 *U. S.* 18[illegible]. In neither case however, was it held that such regulations, when in conflict with the acts of Congress, could be upheld. If the services of Symonds were in the meaning of the statute

performed 'at sea,' his right to the compensation established by law for sea service is as absolute as the right of any other officer to his salary as established by law." To the same effect was *United States* v. *Barnette*, 165 *U. S.* 174, 179.

In *People ex rel. Satterlee* v. *Board of Police*, 75 *N. Y.* 38, 42, the question was whether the compensation of a police surgeon was that fixed by statute or that named in a resolution of a board of police under which he was appointed. He accepted the appointment and performed the duties of the office for more than two years, drawing only the salary fixed by the resolution and which was less than that fixed by statute. The Court of Appeals of New York, speaking by Judge Miller—all the members of the court who voted in the case concurring—said: "As the statute gave the salary, I think fixing the amount at a less rate by resolution could not make it less than the statute declared. There is no principle upon which an individual appointed to a position can be compelled to take less than the salary fixed by law. The acceptance and performance of the duties of the office after appointment is not a waiver of the statutory provision fixing the salary therefor, and does not constitute a binding contract to perform the duties of the office for the sum named. The law does not recognize the principle that a board of officers can reduce the amount fixed by law for a salaried officer, and procure officials to act at a less sum than the statute provided, or that such official can make a binding contract to that effect. The doctrine of waiver has no application to any such case, and cannot be invoked to aid the respondent."

The ruling in that case was reaffirmed in *Kehn* v. *State*, 93 *N. Y* 291, 294, which involved the claim of a fireman whose compensation had been reduced by his superior officer below that fixed by law. The court, speaking by Judge Rapallo, reaffirmed the principles of the *Satterlee* case, and approved the decision in *Goldsborough* v. *United States, Taney's Decisions*, 80, 88, saying: "The present case, however, is stronger than either of those cases cited. At the time the appellant entered into the service his pay was fixed by law, and there is no evidence that he ever consented to a change. It was reduced by the superintendent, and for a portion of the time the appellant took the reduced pay, but that does not estop him from claiming his full pay if he was legally entitled to it."

In the *Goldsborough* case referred to, Chief Justice Taney said: "Where an act of Congress declares that an officer of the Government or public agent shall receive a certain compensation for his services, which is specified in the law, undoubtedly that compensation can neither be enlarged or diminished by any regulation or order of the President, or of a Department, unless the power to do so is given by act of Congress."

In *Adams* v. *United States*, 20 *Ct. Cl.* 115, which involved the compensation due to one who had performed the duties of an inspector and also of deputy collector of customs, the court said: "The law creates the office, prescribes its duties, and fixes the compensation. The selection of the officer is left to the collector and Secretary. The appointing power has no control, beyond the limits of the statute, over the compensation, either to increase or diminish it." In the same case it was also said: "Monthly vouchers were drawn up, reciting the number of days the claimant was employed during the month and the amount of compensation allowed by the collector and Secretary, ending with a receipt 'in full for compensation for the period above stated,' which the claimant signed. We do not think he thereby relinquished his right to claim the further compensation allowed by law. If the appointing officer has no power to change the compensation of an inspector, certainly the paying officer has not. He had no right to exact such a receipt and the claimant lost nothing by signing it. *Fisher's Case*, 15 *C. Cl.* 323; *Bostwick* v. *United States*, 94 *U. S.* 53."

We are of opinion that as the act of 1882 created a distinct, separate office—special inspector of foreign steam vessels—with a fixed annual salary for the incumbent, to be paid by the Secretary of the Treasury out of any moneys in the Treasury not otherwise appropriated; as the plaintiff was legally appointed by the Secretary a special inspector under and by virtue alone of that act; and as he entered upon the discharge of the duties appertaining to that position, he was entitled to demand the salary attached by Congress to the office in question.

It is said that the Secretary, before appointing the plaintiff, had reached the conclusion that the office of special inspector of foreign steam vessels was unnecessary and that all laws providing a separate establishment for the inspection of foreign steam vessels should be repealed. Such undoubtedly was the opinion expressed by the Secretary in his report to the Speaker of the House of Representatives at the first session, 1889, of the Forty-first Congress. But Congress did not immediately heed his recommendation on that subject, and there was no repeal of the act of 1882 until the passage of the statute of March 1st 1895, 28 *Stat.* 699, *c.* 146, § 1. During the entire term of his service as special inspector the act of 1882 was in force. If the Secretary, having become convinced that the special inspectors of foreign steam vessels were not needed and the public interests did not require the appointment of such officers, could properly, for such reasons, have withheld any action under the statute of 1882 until he again communicated his views to Congress; it does not follow that he could make an appointment under that statute conditioned that the appointee should accept a less salary than Congress prescribed. Whether a local inspector should be required to inspect foreign steam vessels without addi-

tional compensation, or whether the visitation and inspection of such vessels should be done by an officer acting under an appointment for that particular purpose, was a matter for the determination of Congress. The purpose of Congress, as indicated by the act of 1882, was to compensate the services of a special inspector of foreign steam vessels by an annual salary of a specified amount. It was not competent for the Secretary of the Treasury, having the power of appointment, to defeat that purpose by what was, in effect, a bargain or agreement between him and his appointee that the latter should not demand the compensation fixed by statute. Judge Lacombe, speaking for the Circuit Court of the United States for the Southern District of New York in *Miller* v. *United States*, 103 *Fed. Rep.* 413, 415, well said: "Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept something less than the statutory sum, is contrary to public policy, and should not be tolerated by the courts. It is to be assumed that Congress fixes the salary with due regard to the work to be performed, and the grade of man that such salary may secure. It would lead to the grossest abuses if a candidate and the executive officer who selects him may combine together so as entirely to exclude from consideration the whole class of men who are willing to take the office on the salary Congress has fixed but will not come for less. And, if public policy prohibit such a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel." If it were held otherwise, the result would be that the Heads of Executive Departments could provide, in respect of all offices with fixed salaries attached and which they could fill by appointments, that the incumbents should not have the compensation established by Congress, but should perform the service connected with their respective positions for such compensation as the Head of a Department, under all the circumstances, deemed to be fair and adequate. In this way the subject of salaries for public officers would be under the control of the Executive Department of the Government. Public policy forbids the recognition of any such power as belonging to the Head of an Executive Department. The distribution of officers upon such a basis suggests evils in the administration of public affairs which it cannot be supposed Congress intended to produce by its legislation. Congress may control the whole subject of salaries for public officers; and when it declared that for the purpose of carrying into effect the provisions of the act of 1882 the Secretary of the Treasury "*shall* appoint officers to be designated as special inspectors of foreign steam vessels, *at a salary of two thousand dollars per annum each*," it was not for the Secretary to make the required appointments under a stipulation with the appointee

that he would take any less salary than that prescribed by Congress. The stipulation that Glavey, who was local inspector, should exercise the functions of his office of special inspector of foreign steam vessels "without additional compensation" was invalid under the statute prescribing the salary he should receive, was against public policy, and imposed no legal obligation upon him. And the mere failure of the appointee to demand his salary as such officer until after he had ceased to be local inspector, was not in law a waiver of his right to the compensation fixed by the statute.

The judgment of the Court of Claims is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed.

The CHIEF JUSTICE, Mr. Justice BROWN, Mr. Justice PECKHAM and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.